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Circuit Court of Appeals

For the Ninth Circuit

WILLIAM L. PAUL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of William L. Paul

Appellant.

Upon Appeal from the United States District Court for the Territory of Alaska, Division No. I.

James Wickersham
Henry Roden
Attorneys for Appellant,
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No. 5815

In the United States Circuit Court of Appeals,
Ninth Circuit.

WILLIAM L. PAUL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

A. STATEMENT OF FACTS IN THE CASE.

SUMMARY.

William L. Paul, the appellant in this case, is a resident of Ketchikan, Alaska, a young member of the bar, and has practiced law for nearly ten years. He is a married man, of southeastern Alaska mixed Indian blood, and of good character.

He presented a petition to bring up for review a judgment of a justice of the peace in the Craig Precinct, wherein a fine of $400.00 was imposed upon Maxfield Dalton, one of his Indian clients, for illegal fishing, and this expression was contained therein:

> "(3) That the plea of guilty was forced from your petitioner and was not a voluntary plea, so that he entered the said plea under threat of the United States Attorney that expensive and dilatory proceedings in admiralty would be started if the said plea was not entered."

This petition was sent by United States mail to Judge Harding in Juneau chambers, to approve the bond and make the order allowing the writ, "in order that the matter may come up before Judge Hill next March." It appears that Judge Harding assumed that he was the United States Attorney mentioned in the above excerpt, and he set on foot contempt proceedings before himself, and himself tried the case and fined Mr. Paul $75.00 on one count and $100.00 on another, for contempt of court. The appeal comes to this court on constitutional grounds.

1. THE FISHERMEN'S CRIME.

Maxfield Dalton is an Indian fisherman and was the only witness called by the government. We think he told the truth as far as his very limited understanding and use of the English language permitted him to do so. We do, however, specially call the attention of the appellate court to the incomplete and fragmentary statement of facts contained in his testimony (owing to his being skilfully "led" by the District Attorney), to his want of understanding of the meaning of the strange language addressed to him and his inability to express his own thoughts in English.

Dalton testified that on the morning of August 17, 1928, he was in charge of a small power boat belonging to his employer Bob Peratovich, an-

other Indian, which boat is named "DUBROVNIK," and was lying adrift in the bay of Klawock, Alaska, waiting for the hour of six o'clock A. M., that he and his crew of three other Indians might begin to fish for salmon.

Pages 9-10, Transcript.

August 27, 1928, was on Monday, and Section 5 of the Act of Congress approved June 6, 1924—43 Stat. L. 464—then provided that:

> "Sec. 5. It shall be unlawful to fish for, take, or kill any salmon of any species in any manner or by any means except by hand rod, spear, or gaff for personal use and not for sale or barter in any of the waters of Alaska over which the United States has jurisdiction from six o'clock post meridian of Saturday of each week until six o'clock ante meridian of the Monday following, or during such further closed time as may be declared by authority now or hereafter conferred, but such authority shall not be exercised to prohibit the taking of fish for local food requirements or for use as dog feed."

The basis then, of the criminal proceeding out of which this controversy arose was that clause in the above-quoted statute which provides that commercial fishing for salmon shall not begin before six o'clock Monday morning. (The record shows that there were two other boats and their crews detained at the same time and place with

that under charge of Dalton, and for the same alleged facts and offenses.)

Pages 32, 38-39 Transcript.

The record shows that there was confusion as to time, and the words "Sitka time" and "Seattle time" are used by Dalton in his testimony.

Page 11, Transcript.

This is explained by the fact that Klawock is officially in the standard meridional time of Sitka, Alaska, to which time the Bureau of Fisheries adheres; but for business convenience Ketchikan and contiguous territory, including the town of Klawock, use Seattle time. Thus when it is officially 5 o'clock the clocks and watches of the whole district show 6 o'clock.

The record shows further—page 17—that early that Monday morning, when the stream watchman, or "commissioner" as he was called by Dalton, came among the fishing boats in his skiff, he was civilly requested for the time and that he made a surly and insulting answer telling them to go to hell and fish by their own time.

These gentlemanly and peaceable Indian fishermen, seeking for the correct time that they might obey the law, waited until after six o'clock by their time, and then in the presence of the fish warden made their first "set." Thereupon that official took their names and later N. O. Hardy, Deputy

Fish commissioner, arrested the masters and crews of three boats including the "DUBROVNIK," and seized the boats, taking the fishermen and the boats to the town of Craig where the United States Commissioner and ex officio justice of the peace resides. Here began a very unfair official pressure to compel them to plead guilty and pay a fine of $400.00, threatening in the event they did not do so to take their boats to Juneau, some 200 miles away, to be proceeded against on the admiralty side of the District Court for forfeiture under Section 6 of the above cited Act of Congress.

Pages 10 and 32, Transcript.

The seizure of these three Indian boats was made under the provision of Section 6 of the Act of Congress above cited. That Section first provides a penalty against any person, company, corporation or association violating the Act, of a fine not to exceed $5,000.00, or imprisonment in jail for not more than 90 days, or both, and then provides:

> "Sec. 6. . . . Every boat, seine, net, trap, and every other gear and appliance used or employed in violation of this Act or in violation of said Act approved June 26, 1906, and all fish taken therein or therewith, shall be forfeited to the United States, and shall be seized and sold under the direction of the court in which the forfeiture is declared, at public auction, and the proceeds thereof, after

> deducting the expenses of such sale, shall be disposed of as other fines and forfeitures under the laws relating to Alaska. Proceedings for such forfeiture shall be in rem under the rules of admiralty."
>
> —43 Stat. L. 464.

It appears from the record that the boats were held in Craig, in the possession of the official watchman, from August 27 to September 2, both dates inclusive, (for some reason not clearly disclosed). On Sunday, September 2, as stated in the testimony of Dalton, the government's witness, "as soon as they got a letter"—page 12, Transcript —the justice of the peace held court, the defendant Dalton entered a plea of "guilty" and was fined $400.00 as agreed on to save the boats from being taken to Juneau for forfeiture, the fine was paid "under protest" and the fishermen and boats were released.

Pages 38-39 and 52, Transcript.

No evidence was offered by the prosecution in this case to deny the facts herein above stated; they stand admitted in the record.

2. THE TRIAL AT CRAIG.

There was no trial, as that term is commonly understood in an American court, at Craig. Under the threat made by officials in charge of the proceeding, that the boat would be taken to Juneau,

some 200 miles away, for forfeiture, the necessity for the defendant Dalton and other fishermen, and the owner, to go there as witnesses to protect the boat from such forfeiture was apparent; it was also a fact, of which the court will take judicial notice, that the bench of the First Division of the District of Alaska was vacant at that time, Judge Harding had not yet been appointed, so that no one knew when such a case might come to trial; to escape from these conditions the Indian defendants were compelled to and did agree that Dalton should enter a plea of guilty and pay a fine of $400.00, "under protest," without trial on the facts before the court or jury.

Page 32, 35 Transcript.

It should be noted that the Alaska statute does not require that justices of the peace shall be lawyers, and U. S. Commissioner Bagley is not a lawyer, but merely a reputable citizen doing his best to dispense justice.

In her testimony on this trial at Ketchikan, in the presence of Judge Harding, Mrs. William L. Paul, being sworn as a witness, under cross-examination testified as follows:

Page 35, Transcript (Testimony of Mrs. Wm. Paul).

"Cross examination. (By Mr. Stabler).

Q. Are you familiar with the petition?

A. Yes.

Q. You helped to prepare it? A. Yes.

Q. And investigated the facts on which it is based. A. Yes.

Q. Were you present in court at the time Maxfield Dalton entered a plea of guilty?

A. No sir. I only know what the commissioner told me, and the fish commissioner was also there when I was there.

Q. What is your authority for making this statement in this plea: "That the plea of guilty was forced from petitioner and was not a voluntary plea, so that he entered the plea under threat from the United States Attorney" and so on?

A. I didn't make that statement. I typed it.

Q. What are the facts on which it is based?

A. Based on the statement by the United States commissioner at Craig. He said he objected to the whole action.

Q. Did the United States Commissioner at Craig tell you that this plea was forced from Dalton?

A. He said these men were told that if they did not plead guilty their boats would be seized and taken to Juneau.

Q. Did he tell you that it was entered because of a threat by the United States Attorney?

A. Yes, in that language I gave.

Q. He told you the United States Attorney had threatened that if this plea was not entered, expensive and dilatory proceedings in admiralty would be started.

A. He said he had no voice in the matter.

Q. I am asking you about the threat of the United States Attorney that expensive and dilatory proceedings in admiralty would be started?

Mr. Paul. That has been answered twice.

Mr. Stabler. I don't think so.

The Court. She may answer.

A. He didn't say "expensive and dilatory proceedings in admiralty." Those words were not Mr. Bagley's words. What he said was the boats would be seized and taken to Juneau by the District Attorney's office.

Page 35-36, Transcript.

We submit that upon the testimony of Mrs. Paul—and it was not denied by any witness—the fear of arbitrary power in the hands of men who sometimes forget they represent the Law, extended beyond the accused Indian fishermen, and paralyzed even the justice court in Craig precinct before whom they were arraigned.

"Q. There was reference in your conversation with Mr. Bagley about the threat of the United States Attorney that expensive and dilatory proceedings in admiralty would be

started if said plea was not entered?

A. Just the language I used—that the District Attorney's office had said if they didn't plead guilty that expensive and dilatory proceedings in admiralty would be started.

* * * *

Q. Did you talk to Mr. Bagley about—what are your facts which you gathered over there, on which you base this statement, "That your petitioner offered to put up bond to secure the release of said boat during the determination of an admiralty suit, which right was refused"?

A. Mr. Paul said, "Why didn't you have the men put up bond?" and he said, "They wouldn't let them put up bond." I don't remember who wouldn't let them put up bond, but that was Mr. Bagley's answer, they wouldn't let them put up bond.

* * * *

Q. When you say, "Your petitioner offered to put up bond," what is your authority for saying that Maxfield Dalton offered to put up bond?

A. The words of the commissioner.

Q. What were those words?

A. I can't say just exactly word for word what he said at the time.

Q. Did the commissioner tell you Maxfield Dalton offered to put up bond?

A. He said the crews offered to put up

bond, there were three involved, all interested.

* * * *

Q. What is your authority for saying in this petition that Maxfield Dalton paid the fine under protest.

A. Because there is a full page—sheet of paper—but it is in the case in the files at Craig in the commissioner's office, where it specifically says, "This fine is paid under protest."

Pages 37 and 38, Transcript.

Mrs. Paul's testimony shows what care she and the defendant took to secure the true facts to be used in the petition for the writ of review in this case. They went directly to the Commissioner and justice of the peace at Craig, where the matter of the alleged trial took place, examined the papers and records, consulted with the owners of the boats threatened, and secured the facts from the commissioner when the records failed to show them. They did not rely on mere rumors or general reports, but took such due care as every responsible and honest attorney is expected to take in such a proceeding.

In addition we call the court's especial attention to the fact that the prosecution made no attempt to deny or qualify Mrs. Paul's testimony. No effort was made to bring Commissioner Bagley or the fish warden to testify, and both Mr. Stabler

and Judge Harding heard her testimony and neither offered himself as a witness to deny or explain anything she said, and the court ought to be bound by her uncontradicted testimony.

We think this evidence shows conclusively and beyond reasonable doubt, that Dalton and the other Indian fishermen were denied a fair trial, were not permitted to enter a plea of not guilty and have their guilt or innocence tested by the evidence in open court, were threatened with the loss of their boat, their season's work, with destitution for themselves and families the following winter season, and denied justice of any kind except on the terms dictated by the prosecuting officers.

3. THE PETITION FOR WRIT OF REVIEW.

The unfair acts of prosecuting officers in these and in other similar cases in the First Division, against Indian fishermen, naturally created much sympathy for the victims, and especially among their own people.

Page 85, Transcript.

House Joint Memorial No. 19, Session Laws of Alaska, 1929.

In his testimony in this cause, pages 25-29, Mr. Paul says that during the month of September he went to the town of Craig accompanied by Mrs. Paul, and thence over to Klawock, where, he had

been informed, Peratovich wished to see him about the Craig trial. He was employed by Peratovich for Dalton to take the case and attempt to recover the fine of $400 by Writ of Review.

> "And then he proceeded to tell me what actually had occured. He represented to me, in speaking for Dalton that the men were not guilty, but that he was informed that unless a voluntary plea of guilty were entered and an agreement to pay four hundred dollars fine and costs the District Attorney's office would seize the boat and take it to Juneau. The language of the petition, of course, is not the exact language in which Bob Peratovich made his statement. But it is the meaning that he intended to give me, and certainly the meaning that was understood by every person who talked about the case and who was around and in Craig and familiar with the case at the time it occured."
>
> Page 25-26, Transcript.

> "I went to the record and made a copy of it —of the papers that were on file, numbering my paragraphs according to the papers which were filed, and in the same order. Paper number five indicates a payment of $436 on September 1, 1928, by R. J. Peratovich, under protest. Then followed the judgment which is set forth in the petition."
>
> Page 27, Transcript.

After returning to his home in Ketchikan, Paul

wrote to Dalton explaining that Peratovich had employed him (Paul) to represent Dalton and the others interested in the effort to recover the fine paid "under protest." Paul prepared the necessary petition and bond and sent them over to Dalton that he might see the petition and sign the bond. Dalton sent Paul the money by mail to pay the costs of filing the papers (petition and bond) in the District Court, Page 28, Transcript. There was some trouble in the mail about the papers, but finally Paul received back the petition and the bond and—

> "Immediately then I joined the two together and sent them on to Judge Harding at Juneau with a letter stating that I thought it was a ministerial matter and would not require the exercise of discretion and that the Judge could have no hesitancy in signing the bond, and I wished it signed quickly so that the case could come up before Judge Hill. My reason was that Mr. Harding was at the time this trouble arose United States Attorney."
>
> Page 28, Transcript.

District Judge E. Coke Hill had been requested to hold a term of court at Ketchikan immediately after Judge Harding's appointment to try those cases in which Judge Harding was known to be disqualified for connection with them in his office as District Attorney. The Dalton case was one of them. In preparation for the hearing of the Dal-

tion case before Judge Hill, at Ketchikan, and on February 6, Mr. Paul wrote a letter to Judge Harding and enclosed the petition and bond with it, and probably a blank order approving the bond. The letter was written from Mr. Paul's office at Ketchikan to Judge Harding in Juneau, some 200 miles away, and it reads as follows:

Law Office of William L. Paul,
Ketchikan, Alaska, Feb. 6, 1929.

Hon. J. W. Harding, Judge,
Juneau, Alaska.

Dear Sir:

I am enclosing the petition, etc. in the matter of the application of Maxfield Dalton of Klawock, Alaska, for a writ of review. R. J. Peratovich, who signed as surety, is the principal merchant of Klawock, owns a cannery, light plant, water system and is worth many thousand dollars.

Inasmuch as signing the order allowing the writ is, in my opinion, not a judicial act, but merely ministerial, I am requesting that you sign same, in order that the matter may come up before Judge Hill next March.

Thanking you for your courtesy, I am,

Yours respectfully,
William L. Paul."

Page 54, Transcript.

Judge Harding received the letter and petition by mail at Juneau, Alaska, some 200 miles away

from Mr. Paul's office.

> "Whereupon the court ordered the said petition filed and directed that the matter as to whether or not the order asked would issue be set for hearing at the term of court called for Ketchikan to begin February 18, 1929, and directed that the United States Attorney and counsel for petitioner be so advised."
>
> Page 41, Transcript.

There is no notice of danger on the face of this order, no warning of any proceedings for "contempt," it merely orders the petition filed and directs that it "be set for hearing at the term of court called for Ketchikan to begin Feb. 18, 1929, etc.," although the Judge was advised that Mr. Paul intended to have the case tried before Judge Hill.

4. PREPARING THE CONTEMPT CASE.

Judge Harding at Juneau ordered the petition for the writ in the Dalton case filed on Feb. 13, 1929, page 40, Transcript; ten days thereafter, on Feb. 23, 1929, the case was called for hearing by Judge Harding at Ketchikan, 200 miles south of Juneau; on Feb. 13, Dalton was at Klawock or Craig, on the west coast of Prince of Wales Island, some 100 miles west of Ketchikan.

Page 20-21, Transcript.

In the meantime, without any notice or warning to Mr. Paul, Dalton's attorney, someone, pos-

sibly the District Attorney, though the record does not disclose who it was, procured one Neilson, the Deputy Marshal at Craig, in a letter which is referred to in Dalton's testimony but is not in the record, to command the Indian Dalton to go to Ketchikan, promising him fees, etc., and there he appeared on Feb. 23rd, ready for the proceedings which took place on that day before Judge Harding.

Pages 20-21, Transcript.

Here follows what the record contains about this strange proceeding, being the testimony of Dalton on cross examination by Mr. Paul:

Q. How did you happen to come to Ketchikan; somebody tell you to come?

A. Yes.

Q. Who? A. This court.

Q. Who in court, what is his name?

A. I don't know the name is.

Q. What kind of paper?

A. (Witness hands counsel paper) Is that the one? (Hands another paper to counsel).

Q. You got letter from marshal to come to Ketchikan?

A. Yes.

Q. Anybody tell you why you come?

A. No.

Q. When you find out first time why you

in Ketchikan?

A. I want to find out, come in to marshal, as what trouble. I can't never understand anything, I said, "Send wire." I ask Bagley send wire what trouble I got; never sent wire; never said nothing; I come over here.

Q. Did you know you did not have to come to Ketchikan?

A. No.

Q. You believed you had to come? A. No.

Q. When marshal told you to come, you think you have to come?

A. Because I got job there.

Q. Anybody read this letter to you?

A. Uh-huh.

Q. Did they tell you you will be paid witness fees and mileage in Ketchikan?

A. Yes.

Q. Signed by Nielson, deputy marshal?

A. Yes, Neilson.

.Q Did Neilson tell you who told him to write that letter?

A. No.

Pages 21-22 Transcript.

Whether this secret method of compelling Dalton's presence in court before Judge Harding on the trial which took place immediately on his appearance there, was done purposely to prevent Mr. Paul from becoming aware that he was to be tried

for contempt on a case to be made, without notice or an opportunity to secure the presence of Bagley, Peratovich and other witnesses for his defense, this court may judge, but that was its effect.

5. THE ALASKA STATUTE ON CONTEMPT.

Chapter 58, Secs. 1441 - 1455 of the Compiled Laws of Alaska, 1913 contains the statutory provisions for the punishment of both direct and constructive contempts and the rules for the trial of such cases. From the record at bar it appears that the judgment against the appellant is for direct contempt and is based on his supposed violation of the first and third sub-divisions of Sec. 1441, which read as follows:

> "Sec. 1441. The following acts or omissions, in respect to a court of justice or proceedings therein are deemed to be contempts of the authority of the court;
>
> First. Disorderly, contemptuous, or insolent behavior toward the judge while holding court, tending to impair its authority or to interrupt the due course of a trial or other judicial proceeding. . . ."
>
> Third: Misbehavior in office or wilful neglect or violation of duty by an attorney, clerk, marshal, or other person appointed or selected to perform a judicial or ministerial service."

The rule of practice in contempt cases is provided in Sec. 1443, as follows:

> "Sec. 1443. When a contempt is committed in the immediate view and presence of the court or officer, it may be punished summarily for which an order must be made reciting the facts as occurring in such immediate view and presence, determining that the person proceeded against is thereby guilty of contempt, and that he be punished as therein prescribed. In other cases of contempt the trial shall proceed upon testimony produced as in criminal cases, and the accused shall be entitled to be confronted with the witnesses against him, but such trial shall be by the court, or in the discretion of the court, upon application of the accused, a trial by jury may be had as in any criminal case."

Chapter 22, Session Laws of Alaska, 1925, is amendatory of the provisions of the last paragraph of Sec. 1443, and provides as follows:

> "Sec. 2. Upon the trial, in any of the courts of the Territory of Alaska, of any person or persons upon a charge of contempt not committed in the presence of the court or so near thereto as to obstruct the administration of justice, any of the persons so charged with contempt shall, upon application therefor, be entitled to trial by jury."

Under this provision and the facts in this case

Mr. Paul was entitled to a jury trial, which was denied to him because he was not advised that he was to be or was being tried on Feb. 23rd at Ketchikan.

We conclude from reading the statute and from the facts and circumstances in the record that it was determined, possibly by the United States Attorney, that the mere delivery of the petition, bond and letter by mail to the judge in his chambers in Juneau, would not constitute "disorderly, contemptuous, or insolent behavior toward the judge while holding court, tending to impair the authority or to interrupt the due course of a trial or other judicial proceeding," because it was not done in open court but in his Juneau chambers.

United States vs. Ginsberg 243 U. S. 472;
61 Law Ed. 853.

But if Mr. Paul should repeat the same words and acts "toward the judge while holding court" "in the immediate view and presence of the court," then the crime would be complete in the highest degree, and the judge would then have jurisdiction and power to punish him summarily for direct contempt without his having the right to "proceed upon testimony produced as in criminal cases,—and the accused shall be entitled to be confronted with the witnesses against him"—and without being "entitled to a trial by jury." Sec. 1443, Compiled Laws of Alaska, 1913. He would

then be in the hands of the judge, who would be unrestrained from doing complete justice in his case.

6. AN EXTRAORDINARY PRELIMINARY.

This trial began at 2:10 P. M., Feb. 23, 1929, at Ketchikan, before Judge Harding, page 2, Transcript, though Mr. Paul had fairly advised him in his letter of Feb. 6, that he desired it to "come up before Judge Hill next March." Page 54, Transcript.

The only pleading in the court when the case was called for trial was the petition for the writ of review, signed by Mr. Paul as attorney for Dalton, Mr. Paul's letter, and possibly an unsigned copy of an order allowing the writ.

See letter page 54, Transcript.

The trial was begun before any appearance, answer or other pleading had been filed in the case by the United States Attorney. No process of any kind had been served on Mr. Paul for contempt, no affidavit of merits charging any fact of contempt, nor any order to show cause as required by Sec. 1444, Compiled Laws of Alaska, 1913.

The intention to proceed with it as a contempt proceeding had been kept so secret that Mr. Paul had no notice of Dalton's expected appearance, or the reason therefor, though he was Dalton's attorney, and no suspicion was in his mind that any

one intended to take action against him for contempt of court. He had not intended any contempt of court, did not know that he was accused of having violated any law, had no warning of impending danger, and was entirely unsuspicious of what actually was in waiting for him.

Counsel feel a deep sense of regret to be compelled to call the attention of the appellate court to the facts in this remarkable case. Our respect for the court would keep us silent if nothing more were involved than the sum of the fines imposed. But the language used by the judge in his Order Reciting Contempt leaves upon the record and character of this young lawyer such a lasting and, we think, such an unjust blot of disgrace and shame, that we feel sure this court will not criticize us if we are both fair and frank in discussing the facts relating to it.

While the heading of the Bill of Exceptions, pages 1-2, Transcript, contains the usual prefatory statement necessary to advise the court about the matters involved, the real fact is that after the completion of an argument by other attorneys at 2:10 P. M. on that day, Mr. Stabler, Mr. Paul and other members of the bar being seated quietly in the court room, Judge Harding said to Mr. Paul:

> "The Court: The application for the writ —for an order allowing a writ of review is before the court for hearing."

Page 2, Transcript.

The court will notice that Judge Harding announces to Mr. Paul that it is the Dalton case that is to be heard. See also Page 1, Transcript, and page 40 Transcript for the same statements.

"Mr. Paul: I wish again to ask leave of the court to continue the case in order that I may make an amended petition—some of the language might be changed.

The Court: Of course, this proceeding is now filed on certain allegations.

Mr. Paul. I wish the privilege of amending, which I think is within the discretion of the court.

The Court: You can state the nature of the amendment.

Mr. Paul: Well, I want to change the language I think of section four (3) of the petition, as not being necessary to substantiate it reasons for—grounds for the—errors in the proceedings and judgment complained of I might strike out portions under number three of line two, all of three and four and a portion of line five under number three.

The Court: You propose to—

Mr. Paul: That is what I want to do."

Page 2-3, Transcript.

If this court will now look at paragraph three (3) of the Petition for a Writ of Review, page 53

Transcript, it will find that this request was to strike out the entire clause which the court afterward used as his basis for contempt. No answer was made to this respectful request and Judge Harding proceeded:

> "The Court: Of course this petition is filed without the support of any affidavits.
>
> Mr. Paul: Will the court rule on my request for a continuance?
>
> The Court: I would like a statement from counsel upon what basis you file this petition making these allegations without the support of any affidavits or evidence; and the court has set this hearing for now. It is open for you to introduce evidence of these matters."
>
> Page 3, Transcript.

No affidavit charging contempt had been served on Mr. Paul, no order to show cause given, no warning, no notice—out of a clear sky came this demand—"and the court has set this hearing for now. It is open for you to introduce evidence of these matters." And Mr. Paul's witnesses, Bagley, Peratovich and the justice's record were all over in Craig, 100 miles away.

> "Mr. Paul: I thought I was following the requirements of the law in asking for a writ of review of the proceedings in the commissioner's court, and I followed or tried to follow section 1376 of the Compiled Laws of Alaska and it was my opinion—judgment—

> that I had set forth in the form and manner required by that section the various items in the petition that are called for, which will give me the order I am seeking. Section 1376 says: "The writ shall be allowed by the District Court or judge thereof, upon the petition of the plaintiff, describing the decision or determination sought to be reviewed with convenient certainty, and setting forth the errors alleged to have been committed therein. Such petition shall be signed by the plaintiff or his attorney, and verified by the certificate of an attorney of the court, to the effect that he had examined the process or proceeding and the decision or determination therein and that the same is erroneous, as alleged in the petition." My view was a supporting affidavit was not required, but if it is the ruling of the court, if it is required, then I think I still have the privilege of filing a supporting affidavit."

The judge does not seem to have been interested in the law of review, for he harked back to the clause which he afterwards thought to constitute contempt.

> "The Court: You allege certain new matter in this petition which is under your oath here as an attorney which I have reason to know is not correct."
>
> Page 4, Transcript.

Here is not only an admission of his personal

bias and prejudice against Mr. Paul, but of his disqualification to sit in judgment in the Dalton case under the provisions of Sec. 1539, Compiled Laws of Alaska, 1913, which provides:

> Section 1539. A judicial officer is a person authorized to act as a judge in a court of justice. Such officer shall not act as such in a court of which he is a member in any of the following cases:
>
> First. In any action or proceeding to which he is a party or in which he is directly interested. * * *
>
> Fourth: When he has been attorney in the action or proceeding in question for either party.
>
> "Mr. Paul: Of course I wish to state that these are not statements of fact, but my opinion concerning errors which were made, on the strength of which I am asking the record come up from the commissioner's court.
>
> The Court: The complaint is sworn to by you as an attorney."
>
> Page 4, Transcript.

The judge was wrong in both matters—it was a petition and not a complaint, it was not sworn to but only certified to by Mr. Paul "that I have examined the proceeding and judgment complained of above and believe that the same is erroneous as alleged in the petition"—a mere conclusion of law.

Pages 51-54, Transcript.

"The Court: Do you think you have a right to file a petition stating these facts without any basis for so stating?

Mr. Paul: I thought I had.

The Court: Without any basis for so stating?

Mr. Paul: Oh, no, not that. If the court requires a supporting affidavit I will submit it.

The Court: I would like to know from you as an attorney what the facts are upon which you base the filing of the petition?

Mr. Paul: It was the statement made by the real party in interest which is the application of Maxfield Dalton for a writ of review."

Page 5, Transcript.

The Court's attention is now called to Mr. Paul's testimony, pages 26-29, Transcript, where he details the facts about his visit to Craig and Klawock, his personal examination of the records of the justice court at Craig, his conversation with Peratovich the owner of the boat at Klawock, his employment by Peratovich as attorney for Dalton and others interested in the money paid for the $400 fine, his preparation of the petition which he sent to Dalton by mail who approved and returned it to Mr. Paul with the necessary money to pay for entering the case in the District Court, etc.

"The Court: Maxfield Dalton is now here.

Mr. Paul: I know he is."

Page 5, Transcript.

But who got him "here"? and how? and what for? Why was Mr. Paul not given notice that he, too, might have Bagley, Peratovich and the record "here"?

"The Court: And you base this upon statements made to you by Maxfield Dalton?

Mr. Paul: Yes."

What did Judge Harding mean by that expressive word "this"? There is yet no process charging Mr. Paul with the crime of "this"or any other.

"The Court: These allegations of the petition, you state to the court, are made to you upon the basis of statements made to you by Maxfield Dalton."

He is now getting more specific in the accusations of the crime of contempt for Mr. Paul is now in the "immediate view and presence of the court."

"Mr. Paul: The facts, were, your honor, given me by Maxfield Dalton in part, and others.

The Court: Are you willing to call him on the stand on that?"

Page 6, Transcript.

Mr. Paul: Of course, I don't think we need

to go as far as that. I am submitting the petition in accordance with section 1376.

The Court: I have reason to know these statements are untrue. Are you willing to call him on the stand?"

Page 6, Transcript.

Here was a young lawyer with limited experience, standing before the court, thinking he was submitting the petition of Maxfield Dalton in a civil case, being brow-beaten by an angry and biased judge, and in sheer desperation very reluctantly he consented that Dalton be called in a proceeding which he felt to be decidedly irregular—but in "the Dalton" case.

"Mr. Paul: I am willing to call him on the stand and willing to take the oath on the stand, too.

The Court: Very well. Then you will have the right to call Maxfield Dalton.

Mr. Paul: I think that proceeding, however, is not regular.

The Court: Do you object to it, or care to put him on the stand?

Mr. Paul: No, I am asking the court to use discretion in this matter. I have asked in the first place that I be permitted to amend, which I believe is my privilege, and certainly has been allowed in other instances than this by the District Court of Alaska, and I think the

law will hold in many cases there is a right to amend petitions exactly as complaints.

The Court: But I am asking you as an attorney of this bar upon what you base this petition?

Mr. Paul: I have stated.

The Court: The petitioner himself, Maxfield Dalton, is now here, and if you care to call him to show he ever gave you any information to the effect contained in that petition, I am ready to hear him."

Page 6, Transcript.

Even a young, inexperienced and frightened lawyer could know that it would do no good to present evidence on that matter to a judge who had just denounced the petition as "untrue,"—as based on perjury in his estimation.

"Mr. Paul: Of course my statement is entirely information that came to me upon a visit I made to Klawock; if my memory serves me right I talked to Maxfield Dalton, Bob Peratovich, W. J. Chuck and others.

The Court: Are you ready to put him on the stand to show he gave you information contained in any of these allegations?

Mr. Paul: Am I required to? I think that is on the court's responsibility, not mine.

The Court: You are not willing to put him on?

Mr. Paul: I am willing he should take the stand and be examined.

The Court: You are willing that he take the stand and be examined by the United States Attorney?

Mr. Paul: I am willing that he be examined, but I think the court might set another time — as long as the proceeding is taking this direction—for me to prepare myself."

Page 6-7, Transcript.

This additional appeal for a continuance "as long as the proceeding is taking this direction—for me to prepare myself" was treated as all others of this kind were—by intentional disregard, denial and continued baiting.

"The Court: He is here and can testify as well now as any other time.

Mr. Paul: Yes, but there are other people interested.

The Court: Do you object to putting him on?

Mr. Paul: No, I am not objecting.

The Court: If you don't object, we might as well put him on."

"(At this point Maxfield Dalton was sworn by the clerk.)"

Page 7, Transcript.

And thus, in an American court ,this young law-

yer, over his request to amend, to have a continuance to secure witnesses, and time for preparation —was compelled by the judge himself to be brought "in the immediate view and presence of the court" so that court might acquire jurisdiction to convict him of the crime of contempt.

And no charge of contempt had been preferred against him by affidavit or otherwise, no order to show cause had been served on him, no witness had been sworn, and the judge was engaged in hearing the case of "In the matter of the application of Maxfield Dalton for a writ of review."

See Judge Harding's statement of this fact
Page 40, Transcript.

7. THE TRIAL—THE WITNESS—THE EVIDENCE.

The preliminary baiting of Mr. Paul by the judge having been effective, and concluded, this extraordinary trial began.

The prefatory statement made by Judge Harding in his "Order Reciting Contempt" against Mr. Paul, at Page 40, Transcript, shows just what he announced to be before the court for hearing at that time:

> "On February 23, 1929, this matter came on for hearing before the court in open court and in the immediate view and presence of the court, upon petition of one Maxfield Dal-

> ton for a Writ of Review," and had theretofore, to-wit, on February 13, 1929, been filed by William L. Paul, an attorney at law and a member of the Bar of this court, in the above entitled court, for the said Maxfield Dalton, a full, true and correct copy of which said petion is hereto attached, marked Exhibit 1, and made a part hereof."

The court's attention is further called to the state of the pleadings at the time of the trial. There was nothing in the way of pleadings before the court at that time except the Petition for the Writ of Review. No appearance, demurrer, answer, motion or other pleading had been filed, or were ever filed, by the United States District Attorney, or anyone, on the part of the opponents of this petition. No issue was attempted to be framed by pleading, except the petition for the Writ of Review. As a matter of fact and law there was nothing before Judge Harding for trial, other than the petition, except the case that was being created by his preliminary attack on Mr. Paul for contempt of Court. And there was no pleading, affidavit, process, order to show cause, no notice or warning, in any contempt case before him.

Then another queer thing happened. Instead of allowing Mr. Paul to introduce evidence in support of the allegations in the Dalton petition, if he desired to do so, Mr. Stabler, the United States District attorney, took control of the proceedings,

called Dalton, Mr. Paul's client, as his witness and launched at once into the prosecution of Paul for Contempt of Court.

Page 9, Transcript.

Of the five errors assigned in the Dalton petition, page 53, Transcript, four were not mentioned on the alleged trial. The United States District Attorney confined his examination of Dalton entirely to the supposed contempt in the third assigned error; the whole evidence in the case was confined to the allegations in that paragraph.

The Writ of Review is provided for by Chapter 55, Secs. 1374-1383, Compiled Laws of Alaska, 1913. Section 1376 provides:

> Section 1376. The writ shall be allowed by the district court or judge thereof, upon the petition of the plaintiff describing the decision or determination sought to be reviewed with convenient certainty, and setting forth the errors alleged to have been committed therein. Such petition shall be signed by the plaintiff or his attorney, and verified by the certificate of an attorney of the court, to the effect that he had examined the process or proceeding and the decision or determination therein, and that the same is erroneous, as alleged in the petition.
>
> Sec. 1377. The writ shall be allowed in all cases where there is no appeal or other plain, speedy and adequate remedy, and where the

inferior court, officer, or tribunal in the exercise of judicial functions appears to have exercised such functions erroneously, or to have exceeded it or his jurisdiction to the injury of some substantial right of the plaintiff.

Sec. 1378. Before allowing the writ the court or judge shall require the party applying therefor to give an undertaking, with one or more sureties, subject to its or his approval, in the amount to be fixed by it or him, conditioned that he will perform the judgment or decision sought to be reviewed in case the district court shall so order, and judgment may be given in said court against the applicant and his surety or sureties in case the judgment or decision sought to be reviewed shall be affirmed for the amount thereof, and the cost of said proceeding.

Sec. 1381. Upon filing of the order allowing the writ, and the petition and undertaking of the plaintiff, the clerk shall issue the writ, according to the direction of the order. The writ shall be served, etc.

Sec. 1383. Upon the review the court shall have the power to affirm, modify, reverse, or annul the decision or determination reviewed, and, if necessary, to award restitution to the plaintiff, or by mandate, direct the inferior court, officer, or tribunal to proceed in the matter reviewed according to its decision, etc.

THE WITNESSES.

The court will see from the record that but

three witnesses testified before Judge Harding—Dalton, Mr. Paul and Mrs. William L. Paul. Dalton, pages 9-25, repeated at 55-70; Mr. Paul 25-30, repeated at 79-84; Mrs. Paul, 30-39, repeated at pages 70-79, Transcript.

Neither Judge Harding nor Mr. Stabler was sworn as a witness and no witness was offered in support of the alleged contempt by them except Dalton. The court will see from his inability to understand and correctly answer the questions propounded to him on Mr. Stabler's part, that Dalton was an illiterate Indian, totally unacquainted with what it all meant, and hardly able to understand the meaning of the simplest questions asked.

THE EVIDENCE.

The evident purpose of all the secrecy in securing the presence of Dalton at the time of the trial was to lead him into testifying that he had not talked to Mr. Paul, his attorney, about certain matters, and thereby to prove that Mr. Paul, himself, was responsible for the clause carrying the alleged contempt in the Petition for Review.

> "Mr. Paul: If the court please, the attorney is doing a good deal of leading. He testified he got a letter and he turns it into a complaint.
>
> The Court: They were leading questions.
>
> Q. When you were told you were guilty

did anybody tell you you had to say that?

A. Baronovich, he speak, you know, but he afraid to lose boat. Bob Peratovich told me to say that. "If you don't say it, I lose the boat."

Page 12, Transcript.

(The record shows that "Baronovich" is a reporter's mistake, and that when that name is used it means "Peratovich").

Q. Baronovich told you to plead guilty.

A. Yes.

Q. Did anybody else tell you to plead guilty? A. No.

Q. Did the United States Attorney tell you to plead guilty? A. No.

Q. Did any officer tell you to plead guilty?

A. No.

Q. Just Bob Peratovich? A. Yes.

Q. Now at that time did you offer to put up a bond? A. No.

Q. To secure the release of Peratovich's boat? A. No.

Q. Did anybody say anything to you about a bond? A. No.

Q. Did anybody say anything to you about a suit in admiralty? A. No.

Q. Did anybody refuse to let you put up a bond? A. No.

Pages 12-13, Transcript.

This is evidently the testimony upon which the Court in his Order Reciting Contempt based his conclusion that Mr. Paul's statements in the 3rd paragraph of the Petition "were fictitious, false and untrue and known by the said William L. Paul to be fictitious, false and untrue, and were made by the said William L. Paul with the fraudulent intent and purpose of deceiving the court," etc. Page 45, Transcript.

On cross examination by Mr. Paul, however, Dalton disclosed some facts which the skillful and leading questions of the District Attorney did not bring out.

Cross examination (By Mr. Paul)

"Q. Maxfield, you worked for Bob Peratovich. A. Yes.

Q. On his boat? A. Yes.

Q. Are you related to Bob Peratovich?
A. Yes.

Q. Does Bob Peratovich do your business for you? A. Yes."

Page 16, Transcript.

Q. Awhile ago, talking to Mr. Stabler, you said Bob afraid of his boat?

A. I say he afraid he lost his boat. That is the way he feel to pay his fine.

Q. Do you know why he was afraid?
A. No.

Q. Do you know who made him afraid to lose his boat? A. No.

Q. Do you know if the fish commissioner tell him "going grab your boat"? A. No.

Q. You never heard? A. No.

Q. Did you hear Bob talk to fish commissioner?

A. No. I hear talk to fish commissioner, but I don't know what talking about.

Page 18, Transcript.

Q. After Bob Peratovich came from Seattle you testified you got a letter from him (me?) Do you have that letter?

A. No, he got him.

Q. Bob Peratovich? A. Yes.

Q. He keep all your letters this case?

A. Yes.

Q. Does he have that letter too? A. Yes.

Q. One I wrote you after Bob came from Seattle? A. Yes.

Q. In that letter do you remember what that letter said? A. No.

Q. Did I promise to win case for you?

A. Uh-huh.

Q. Did I tell you good case, bad case, or not sure?

A. I don't know.

Page 19, Transcript.

Q. Do you remember how many papers in that letter when you got bond?
A. Two.

Q. Two? A. Uh-huh.

Q. What was on each paper? A. I can't understand.

Q. Did you read the papers?
A. They read to me.

Q. They read to you; everything was all right, you think?
A. Uh-huh.

Q. What did you do with the papers?
A. I don't know. Bob sent them back, I think, to you.

Q. Bob looked after your business?
A. Uh-huh.

Page 20, Transcript.

Q. Did you feel all right at the time you paid the money?
A. No.

Q. Do you know what protest means?
A. No.

Q. Now you talked to the fish commissioner Hardy?
A. I not talk to him.

Q. Never talked to him? A. No.

Q. Bob do all the talking? A. Yes.

Q. Talked for you, too? A. Yes.

Q. Do you know this petition filed in this case, do you know about it? A. Yes.

Q. Who read it to you? A. Bob Peratovich.

Q. You feel it was all right. A. Uh-huh.

Q. Do you want your case to come up?
A. Uh-huh.

Q. You gave the letter back to Bob Peratovich to send to me, did you? A. Uh-huh.

Page 23, Transcript.

Examination by Mr. Stabler.

Q. Was Peratovich in Mr. Bagley's office when you told the Commissioner you were guilty? A. Yes.

Q. Peratovich was in Mr. Bagley's office when you told the Commissioner you were guilty?

A. Uh-huh. Peratovich told me to say that. He didn't want to lose his boat.

Q. He told you to say it? A. Uh-huh.

Q. Did Peratovich say anything to the Commissioner Mr. Bagley?

A. He talked—as soon as I pay my fine I go out; he talk, I don't know what he talk about.

Q. You pleaded guilty because Peratovich told you to, is that right?

A. Yes. Mr. Bagley he got this case, he knows everything."

Page 24, Transcript.

On this phase of the case the Pauls, as witnesses, fully support and reinforce the poorly expressed Indian evidence of Dalton. Mr. Paul testified:

> (25) "I then proceeded to the town of Klawock and while there was informed that Bob Peratovich wished to see me about his boat. Bob Peratovich, when I went to see him, told me that Maxfield Dalton was out of town but had asked him to represent him, and see if something could not be done about recovering the four hundred dollars. And then he proceeded to tell me what actually had occurred. He represented to me, in speaking for Dalton (26) that the men were not guilty, but that he was informed that unless a voluntary plea of guilty were entered, and an agreement to pay four hundred dollars fine and costs, the District Attorney's office would seize the boat and take it to Juneau. * * * The matter of putting up the bond—that statement in the petition, comes through Bob Peratovich, who claimed to be representing Maxfield Dalton, and it was my understanding at the time that Bob Peratovich acted as a sort of an attorney in the case being also an interested party—but he was refused: he was told—so he informed me—that he could not put up a bond."

Page 25-26, Transcript.

Mr. Paul further testified that he wrote to Dal-

ton after his return to Ketchikan, and told him that Peratovich had employed him to represent Dalton, and asked for confirmation of Bob's action which was fully given.

> "I received a letter asking me to proceed and paying me ten dollars for costs."
>
> Page 27, Transcript.

Then Mr. Paul prepared the petition and bond, at Ketchikan and sent them to Dalton by mail. He received them back from Dalton after some delay, and Dalton testified before Judge Harding that Peratovich read them to him in Klawock, before their return to Mr. Paul.

> "Q. Do you know this petition filed in this case, do you know about it? A. Yes.
>
> Q. Who read it to you? A. Bob Baronovich (Peratovich).
>
> Q. Do you feel it was all right? A. Uhhuh."

Mrs. William L. Paul testified on this matter:

> Q. Now then, did you hear about this particular case—hear it discussed by Bob Peratovich and Maxfield Dalton?
>
> A. Yes. I heard it discussed by Bob Peratovich.
>
> Q. Was he presuming to represent anybody? A. Yes.
>
> Q. Whom did he represent?

A. The master of the boat.

Q. What was his name?
A. Maxfield Dalton.

Q. Did he say anything to you about his relationship to the boat itself?
A. He said he was the owner of the boat; it was his boat.

Q. Do you remember the story he told about the boat?
A. Yes.

Q. Are you familiar with the contents of the petition? A. Yes.

Q. Where was Maxfield Dalton at that time?

Page 31, Transcript.

A. He was out fishing.

Page 32, Transcript.

Q. What became of the petition?
A. It was filed in court.

Q. Was that ever submitted to Maxfield Dalton?
A. The bond and the petition were sent together in the first instance; he had sent the petition back without the bond.

Q. In the first instance the petition and bond were sent in one letter to Maxfield Dalton? A. Yes.

Q. And the petition was returned?
A. Without the bond.

Q. Without the bond?
A. But with the ten dollars."
Page 34, Transcript.

Both Mr. and Mrs. Paul testified fully and clearly that Mr. Paul was employed at Klawock by Peratovich, the owner of the boat, to represent Dalton and Peratovich both, and that Dalton was so informed by letter, and by return mail fully authorized him to act as attorney for him; that the petition and bond were both sent to Dalton, read to him by Peratovich, and he approved them and sent the fees for filing them to Mr. Paul; the Pauls both made careful inquiry about the facts at Craig, from the Commissioner (page 35, Transcript), and there inspected Judge Bagley's records in the case, took such notes and copies as they needed, and generally acted in entire good faith in securing the facts in the way any other careful and honorable laywer would do. And there is no attempt on the part of the prosecution by the testimony of a witness to deny the good faith of Mr. Paul in these matters, or of his fair employment as the attorney for Dalton, or that Dalton received the petition and bond in the case, heard them read by Peratovich, and returned them with his approval and the fee of ten dollars with which to file them in the District Court.

Nor was there any attempt by the prosecution to impeach the character of either of these three wit-

nesses, or to deny their testimony.

8. FINDINGS OF FACT IN ORDER RECITING CONTEMPT

The trial of the appellant took place on February 23, 1929, and was wholly concluded on that day.

Pages 1 and 40, Transcript

The Affidavit of Prejudice, complained of in the Order Reciting Contempt, was made, sworn to and filed by Maxfield Dalton in his case entitled "In the Matter of the Application of Maxfield Dalton for a Writ of Review" on February 25, 1929, two days after the trial of Mr. Paul for contempt on February 23rd.

Pages 84-88, Transcript.

The trial in this case, after the preliminary coercion by Judge Harding, began by Mr. Stabler's calling Maxfield Dalton, as a witness for the prosecution. In support of his own good faith and honest purpose, in the Dalton case and at the earnest insistence of Judge Harding (page 25, Transcript), Mr. Paul was sworn and thereafter called Mrs. Paul as a witness to the same purpose. Judge Harding, having thus coerced the trial of this case upon the evidence of witnesses, and Mr. Stabler in so trying it, gave a fixed legal character to the case which this court will not fail to recognize. By this action on the part of the court and the

district attorney, they stamped it a constructive contempt, where "the trial shall proceed upon testimony produced as in criminal cases." Sec. 1443 C. L. A. 1913. Judge Harding established this character of the offense in his Order Reciting Contempt, when, after declaring Paul's testimony to be "fictitious, false and untrue" he says "all whereof more fully appears by the transcript of said evidence, and said statement on his own behalf, and the record and files of said proceedings hereunto annexed".

Page 49, Transcript.

He thus based his final judgment on the "transcript of said evidence" and the record and files in the case. The Statute of Alaska provides, where contempt is tried on the evidence of witnesses as in criminal cases.

> Sec. 1450. Upon the evidence so taken the court or judicial officer shall determine whether or not the defendant is guilty of the contempt charged and, if it be determined that he is so guilty, shall sentence him to be punished as provided in this chapter."

The case having been forced to trial by Judge Harding on the evidence of witnesses, because the alleged contempt did not take place "toward the judge while holding court" (sec. 1441, comp. Laws Alaska, 1913, the above quoted section applies, and the case must be tried "upon the evidence so

taken", and not upon the mere fiat of the judge as for direct contempt, "toward the judge while holding court" and "in the immediate view and presence of the court".

At any rate it would be a shocking thing for an American judge to render a decision of conviction for crime upon any other than evidence fairly and lawfully presented him. To that phase of the case we now direct attention.

We call the attention of the appellate court to the alleged findings of fact made by Judge Harding in his Order Reciting Contempt and to "the evidence so taken by the court or judicial officer" upon which he "shall determine whether or not the defendant is guilty of the contempt charged" (sec. 1450, supra). We make the point that there is no evidence in the record to support these findings—nor the two final judgments.

The Order Reciting Contempt contains two separate findings and judgments against the appellant Paul. The first finding and judgment is based upon the alleged filing of the petition for review, containing paragraph 3, before Judge Harding on February 13, 1929, upon which a fine of $75.00 is imposed.

Page 40-47, Transcript.

The second finding and judgment is based upon the same paragraph 3 in the petition for review, with the additional charge of contempt for

filing the affidavit of prejudice in the Dalton case. (pages 84-87, Transcript).

Pages 47-51, Transcript,

The trial for contempt took place on February 23, 1929, Page 1. Tr.

The affifdavit of prejudice in the Dalton case appears to have been signed and sworn to by Dalton on February 25, 1929, and was attached to Judge Harding's Order Reciting Contempt, but there is no testimony of any witness or other evidence about it in the record. There are no file marks to show when it came into court.

The Order Reciting Contempt is dated March 4, 1929, and was made, signed and filed on that day as shown by the file marks in the record.

Page 51, Transcript.

9. FINDINGS IN SUPPORT OF FIRST JUDGMENT

The findings of fact and the judgment in the first ground of contempt are based wholly upon the alleged contempt contained in the words of the 3rd paragraph of the Petition for the Writ of Review.

Page 53, Transcript.

These findings and the judgment thereon are to be found on page 40-47 Transcript. To show how even a judge may sometimes use a wrong

statement of fact, when that very matter is before the court, on page 40 Transcript, in his Order Reciting Contempt, Judge Harding solemnly finds as a fact that the Petition for the Writ of Review

> "had theretofore, towit, on February 13, 1929, been filed by William L. Paul, an attorney at law and member of bar of this court" etc,

And on the very next page, 41, he makes this finding:

> "Whereupon the court ordered the said petition filed" etc.

On February 13, 1929, Judge Harding was in Juneau chambers, and William L. Paul was in Ketchikan, 200 miles away. The fact was that Judge Harding on that day received in Juneau the letter written by Mr. Paul on February 6 at Ketchikan, with the petition, Page 54, Transcript, and himself ordered the petition to be filed, and Mr. Paul did not file it, or intend Judge Harding to file it. This is not an important error, but it shows that even a judge may sometimes make a verbal slip, as Mr. Paul is alleged to have done in paragraph 3 of the petition.

On page 44, Transcript, begins the recital of a long list of reproachful adjectives describing Mr. Paul's duty to the court, and on page 45 quotes the alleged contemptuous words found in paragraph 3 of the Petition for the Writ:

"and certified the same to the effect that he had examined the proceedings and judgment in the case complained of and believed that the same was erroneous as alleged in the petition.

Whereas in truth and in fact the said statements and allegations of said petition so made, signed, certified and filed in said court as aforesaid, by the said William L. Paul, acting in the office and capacity of an attorney at law and member of the bar of this court as aforesaid, in the proceedings aforesaid, and in the immediate view and presence of the court aforesaid, were fictitious, false and untrue and were known by the said William L. Paul to be fictitious, false and untrue, and were made by the said William L. Paul with the fraudulent intent and purpose of deceiving the court and thereby obtaining of and from the court a process known as a writ of review; that said statements and allegations of said petition so made, signed, certified and filed, as aforesaid, were false and untrue in this: That while said petitioner Maxfield Dalton did enter a plea of guilty to the charge of illegal fishing before said United States Commissioner, H. S. Bagley, and was sentenced by said commissioner to pay a fine of four hundred dollars and costs taxed at thirty-six dollars.

1. Said plea of guilty was not forced from said petitioner."

Page 46, Transcript.

Of course, Judge Harding was not present at the trial of Dalton at Craig, and does not know what occurred there except from the evidence of the witnesses before him, and cannot take judicial notice of the fact assumed; it must be upon the testimony of Dalton, Mr. Paul and Mrs. Paul, for they were the only witnesses examined about it. While much of the evidence was hearsay, it was not objected to, and proves beyond a reasonable doubt that the plea of guilty was forced from said petitioner to save the boat from being taken to Juneau for forfeiture.

2. "and said plea was a voluntary plea on the part of said petitioner."

Page 46, Transcript.

We submit to the appellate court that Judge Harding had no evidence before him to support that finding. The evidence was all the other way and was not denied nor questioned by any witnes or other evidence in the case.

3. "and said petitioner did not enter said plea of guilty under a threat of the United States Attorney that expensive and dilatory proceedings in admiralty would be started if the said plea was not entered."

Page 46, Transcript.

No evidence was introduced on the trial to show

who was the United States Attorney at the time of the trial of Dalton at Craig. We have stated heretofore in this brief that Judge Harding then occupied that office, and it may be the court will take judicial notice of that fact, though it is not shown by any evidence in the case. The court may also take judicial notice of the fact that the United States District Attorneys in Alaska have assistants who are appointed with the consent of the Attorney General, and are fully authorized to represent them in all such matters as this Craig trial.

We submit that in the case at bar, somebody did represent the District Attorney, and act in his name, when, after waiting from August 27, the day of arrest until Sunday, Sept. 2, the day of trial, the penalty was imposed. The earmarks of this assumption are these: as a matter of law the officers of the Bureau of Fisheries may make arrests for violations of the Fisheries laws. But when they have done so, the burden of the prosecution falls on the District Attorney's office and no compromise or other matters can be agreed upon except by and with the consent of the District Attorney. If the negotiations were carried on by the Fish Wardens with Commissioner Bagley, and Peratovich, representing Dalton, they undoubtedly represented that it was at the direction of the District Attorney or the District Attorney's office, as the testimony of both Mr. and Mrs. Paul asserts.

Every subsequent act in this case indicates that the District Attorney was carrying out the plan outlined by the witnesses; for the men were not released from arrest until they had agreed to pay the fine of $400 and had done so (in the case of Dalton) under protest. And then the District Attorney without further communication with him by the defendant Dalton, ordered the boat released although the law directs what shall be done with fishing gear used in violation of law. This practice of bargaining for a plea of guilty (very effective in southeastern Alaska where the fishing season lasts only a few days and the mere thought of having a fishing boat held for legal proceedings would make the person owning it realize that his entire year was ruined whether he was innocent or guilty) was so much abused that the legislature of Alaska passed a memorial unanimously asking Congress to change the law. (House Joint Memorial No. 19, Session Laws of Alaska 1929). And does it make any legal difference, if the bargaining was done by the District Attorney's deputy or other representative? In any case the parties two hundred miles distant from the office of the District Attorney at Juneau, in Craig, would understand that whatever was being done in the prosecution of this crime was being done by the District Attorney. If these representations were being made at Craig and were so understood by Perato-

vich, the attorney for Dalton, Dalton would be justified in saying in the petition prepared for him by Mr. Paul that "the plea of guilty was forced by a threat of the United States Attorney." If this is true, and the testimony abundantly supports it, how can Judge Harding take exception to it and say that of his own personal knowledge such a statement is untrue. He must perforce depend upon the testimony of others as to what occurred at Craig. And when he depends upon the testimony of others, it is not direct contempt.

The evidence shows beyond a reasonable doubt that Commissioner Bagley, the justice before whom Dalton was tried, told Mrs. Paul how the pressure was exerted. On cross examination by Mr. Stabler she testified:

> "Q. Were you present in court at the time Maxfield Dalton entered a plea of guilty?
>
> A. No sir. I only know what the commissioner told, and the fish commissioner was also there when I was there.
>
> Q. What is your authority for making this statement in this plea: "That the plea of guilty was forced from petitioner and was not a voluntary plea, so that he entered the plea under threat of the United States Attorney," and so on?
>
> A. I didn't make that statement. I typed it.

Q. What are the facts on which it is based?

A. Based on the statement by the United States Commissioner at Craig. He said he objected to the whole action.

Q. Did the United States Commissioner at Craig tell you that this plea was forced from Maxfield Dalton?

A. He said those men were told that if they did not plead guilty their boats would be seized and taken to Juneau.

Q. Did he tell you it was entered because of a threat by the United States Attorney?

A. Yes, in that language I gave. (36).

Q. He told you the United States Attorney had threatened that if this plea was not entered, expensive and dilatory proceedings in admiralty would be started?

A. He said he had no voice in the matter.

Page 35-36, Transcript.

A. Just the language I used—that the District Attorney's office said if they didn't plead guilty that expensive and dilatory proceedings in admiralty would be started."

Page 37, Transcript.

The evidence in this case is without dispute that the officials in charge of this proceeding at Craig did make that threat in the name and as representative of the United States District Attorney and all parties there understood it that way. Some official representing the District Attorney did make that

threat, with the result mentioned. Judge Harding was not there, and while he may have knowledge in his own breast that he did not make such a threat, the very law itself and the circumstances in the case made the threat, and his representative at Craig repeated and enforced it. And if the court had given Mr. Paul notice of the proposed contempt proceedings he could have had ample proof of the threat at the trial.

> 4. "That said petitioner did not offer to put up a bond to secure the release of said boat during the determination of an admiralty suit or at all."
>
> Page 46, Transcript.

Of course the evidence on that point is clear, convincing and undisputed in the record. The evidence is all one way and Judge Harding is mistaken in making such a finding—there is no evidence in the record to support it.

> 5. "that said petitioner was not refused the right to put up such a bond."
>
> Page 46, Transcript.

Mrs. Paul testified that Commissioner Bagley told her that such right was refused (page 38, Transcript). Mr. Paul testified that Peratovich gave him the same statement (page 26, Transcript) and not a witness denied it. There is no evidence in the record to justify that finding.

6. "that said petitioner did not pay his said fine under protest."

Page 46, Transcript.

Mr. Stabler asked Mrs. Paul about that and she said:

"A. Because there is a full page—sheet of paper—but it is in the case in the files at Craig in the Commissioner's office where it specifically says: "This fine is paid under protest"

Page 39, Transcript.

and Mr. Paul testified:

"Paper number five indicates a payment of $436 on September 1st, 1928 by R. J. Peratovich under protest."

Page 27 Transcript.

7. "that said petitioner did not inform said commissioner at the time of paying the fine or at any other time or at all that he protested against the entire proceedings and would ask for a review by the District Court, or at all."

Page 46, Transcript.

Again, Judge Harding was not present at the Craig trial and cannot have any personal knowledge of that fact—the testimony is the other way. Dalton was represented at that trial by his partner Peratovich, an educated man, who advised with him, made formal objections and offers for him, and saw to it that the protest against the payment

of the fine was made for him. Concede that these things were actually done for Dalton by Peratovich—and the testimony is clear and undisputed that they were so done—in the law they were done by Dalton.

Because these matters were done by Peratovich, as the attorney for Dalton, Judge Harding makes the finding that they were not done by Dalton. That is a wrong assumption and there is no evidence in the record upon which to base it.

In his conclusion, on page 47, Transcript, Judge Harding said:

> 8. "that William L. Paul, when asked as an attorney as to the source of the allegations made in his petition, stated that they were made to him by the real party in interest, Maxfield Dalton, whereas in fact they were not so made to him, and his statement to the court in his own behalf herein shows they were not in fact made to him by Maxfield Dalton."
>
> Page 47, Transcript.

The court does not quote Mr. Paul correctly. What Mr. Paul did say is in the record. On page 5, Transcript, during the colloquy between the court and Mr. Paul, while the evidence for contempt was being gathered:

> "The Court: These allegations of the petition, you state to the Court, are made by you

upon the basis of statements made to you by Maxfield Dalton?

Mr. Paul: The facts were, your Honor, given me by Maxfield Dalton in part, and others."

Page 5, Transcript.

Peratovich, who acted as Dalton's attorney at Craig, also told Paul the facts and Paul testified fully, fairly and positively to them, at page 25-26, Transcript.

Mr. Paul prepared the petition in controversy after the fairest inquiry of Commissioner Bagley and Bob Peratovich, who represented Dalton at the Craig court; he sent that petition with these statements in it to Dalton, who had Peratovich read it to him, and then approving and saying these exact words were true, Dalton sent it back to Mr. Paul to file in court. Dalton testified to this as fully as his understanding of the English language would permit him to do.

"Q. Do you know this petition filed in this case? Do you know about it? A. Yes.

Q. Who read it to you?

A. Bob Peratovich.

Q. You feel it was all right? A. Uh-huh."

Page 23, Transcript.

Thus Dalton saw, understood, and testified before Judge Harding.

Again, Maxfield Dalton, after mature deliberation, on Feb. 25th, 1929, in his Affidavit of Prejudice directed against Judge Harding (page 84, Transcript) shows that he regarded the original petition for a Writ of Review as his own act and that the application was made through William L. Paul, his attorney, thus:

> "I, Maxfield Dalton, being first duly sworn, depose and say that I have made application through my attorney, William L. Paul, for a Writ of Review for errors of law."
>
> Page 84, Transcript.

In view of this reaffirmation, what becomes of Mr. Stabler's attempt to show that the allegations of the petition were not the statements of appellant?

The conclusion is, having due regard for the facts, that the petition is Dalton's, it was read by him, he approved it, sent it back to Mr. Paul for filing and when Judge Harding became offended at it, he fathered the petition again and asked that Judge Harding cease its consideration on account of prejudice. All this was before Judge Harding when he entered his Order Reciting Contempt on March 4.

10. FINDINGS IN SUPPORT OF THE SECOND JUDGMENT.

The findings in support of the second judgment

seem to be divided into two parts; the first part finds Mr. Paul guilty of contempt for testifying untruthfully "in the immediate view and presence of the court." Nothing is stated in this part of the findings wherein or how the testimony so forced out of Mr. Paul by the grilling of the judge on the first eight pages of the Transcript was untrue, but he is fiercely condemned for that

> "all whereof wholly failed to show that the statements and allegations of said petition, as aforesaid, were true, or that he had reason for believing the same to be true; but on the contrary showed the same to be fictitious, false and untrue; and that he had no reason for believing the same was true . . . all whereof fully appears by the transcript of said evidence, and said statement in his own behalf, and the record and files of said proceedings hereunto annexed."
>
> Page 49, Transcript.

Upon weighing the testimony of Mr. Paul, the court denounces it as untrue, in spite of the fact that the testimony of the other witnesses corroborates it—and the judge has none other before him.

The second part of the findings in the second judgment is based upon a supposed untruthful statement contained in paragraph 3 of the Affidavit of Prejudice, (page 86, Transcript), made, signed and sworn to by Maxfield Dalton, on Feb. 25th, two days after the trial for contempt, yet in

time to get into his Order Reciting Contempt which was not delivered until March 4, 1929.

The finding of Judge Harding on this branch of the case (page 50, Transcript) refers to this affidavit of prejudice as containing excessive and unnecessary allegations:

> 9. "and were wilfully false and untrue in this: that said affidavit of prejudice in which William L. Paul, acting as attorney as aforesaid stated that, "The said Hon. Justin W. Harding, during the course of said hearing and before any evidence was heard, said, 'I have reason to know these statements (referring to the contents of said petition) are untrue,' whereas, the court finds what was in truth and fact stated was as follows: 'You allege certain new matter in this petition, which is under your oath here as an attorney, which I have reason to know is not correct,' which statement was reported by the reporter and made a part of the record of the proceeding, all of which said William L. Paul then and there well knew."

Now the court is mistaken again, for he did use the exact phrase quoted in Dalton's affidavit of prejudice in paragraph 3, as a part of his effort to force Mr. Paul to come within the presence of the court and testify, at the top of page 6, Transcript.

"Mr. Paul: Of course, I don't think we

need to go as far as that. I am submitting the petition in accordance with section 1376.

The Court: I have reason to know these statements are untrue. Are you willing to call him on the stand?"

Page 6, Transcript.

So the fact is the judge used both expressions mentioned in his finding, during his remarkable examination of Mr. Paul, as shown in the first eight pages of the Transcript—on pages 4 and 6.

Whereupon, however, Judge Harding heaped many more excessive and unnecessary adjectives upon appellant's head, and fined him $100 additional, because the court did not happen to notice that he had accused the defendant twice of being an untruthful person, instead of once.

We submit that the record shows beyond doubt that the defendant correctly quoted the proper threatening phrase used by the court, calling the helpless young lawyer an untruthful person in open court before his trial had begun before the same judge, and that there is not any evidence in the record to support the finding that the wrong expression was used in the affidavit of prejudice. Wherefore this second judgment is without the support of any evidence, the court had no jurisdiction to make it, and that branch of the judgment should be reversed.

11. MR. PAUL'S ATTEMPT TO AMEND AND APOLOGIZE.

When Judge Harding called the matter up at Ketchikan on Feb. 23 the first utterance of Mr. Paul was a request for leave to amend by striking out of the petition the clause which the judge thinks constituted contempt. No answer was given to this request until the case was concluded, Page 39, Transcript. His request for a continuance and leave to prepare his defense was again made—but no answer to such requests was made by the judge who continued his grilling.

Pages 3, 6, 7, 29, 83, Transcript.

Mr. Paul had no intention to insult Judge Harding in the statements in the petition, or otherwise, and did not realize that the judge took that view of that matter until the cross-examinations and denunciations of the judge in the first eight pages of the Transcript informed him of the judge's feeling, and then sought by the most humble apologies to mollify him and cure the situation. On pages 28 and 29 Mr. Paul made these statements:

> "I made no statement that I did not believe could be substantiated by the facts. I certainly made no statement for the purpose of insulting anybody or for the purpose of belittling the court or treating it in any way that might be considered contempt, and thinking that perhaps some of the language might be

construed as such I offered and asked leave of the court to amend my complaint (petition) so that particular language might be stricken and changed. That is my statement.

The Court: That is all. I don't think he should be submitted to cross-examination in this case; he makes this statement voluntarily.

Mr. Paul: Of course I could go farther and say as long as there is to be no cross examination I am willing to say to the court if it is the Court's opinion my language is couched in words that are derogatory I am willing to withdraw them and apologize for them; and that is the purpose for which I made the motion to amend the petition and the reason I referred to it only in lines so and so of paragraph so and so, so that the language would not be public property etc. . . . and I still wish to renew the offer.

The Court: That is all."

No apology, no excuse, no continuance to amend so as to strike out the offending language was considered, no answer was made to these apologies and request, except the court said: "That is all," which was in effect a denial, and shows the feeling and intention of the judge in pressing the matter so arbitrarily.

12. THE AFFIDAVIT OF PREJUDICE.

This affidavit was not in the files or before

Judge Harding on Feb. 23, when he tried Mr. Paul for contempt. It was signed, sworn to by Dalton and certified to by Mr. Paul on Feb. 25th—two days after Dalton, in open court, heard Judge Harding denounce his attorney and his cause as is shown on the first eight pages of the Transcript. Even an Indian client with as little understanding of the court's language as Dalton had knew from what occurred there that he would not be justified in trying his case before that Judge, and Mr. Paul would have betrayed his client's cause not to have attempted to secure its trial, as he informed Judge Harding in his letter of Feb. 6 he intended to do, before another judge.

We submit that the affidavit was fairly and courteously worded and the facts in the record amply justified Dalton's action in filing it to prevent Judge Harding from trying his case. In his certificate to that affidavit Mr. Paul certified that he is the attorney for Dalton who is filing the affidavit, "and that said affidavit and application has been made in good faith." Yet Judge Harding based his second judgment of direct contempt, under the first clause of Sec. 1441, for "disorderly, contemptuous, or insolent behavior toward the judge while holding court, tending to impair its authority or to interrupt the due course of a trial or other judicial proceeding," upon that affidavit.

There is no evidence in the record that it was

presented in open court, or that it was even filed in the court or the clerk's office—there are no file marks on it and no evidence in relation to it. Certainly there is no proof of a direct contempt in relation to it—there is no evidence to show that it was intended to have that effect, and its presence in this record and its contents are not evidence sufficient to support the finding or the judgment based on it. It did not constitute contempt.

Tjosevig v. United States, 255 Fed. 5.

13. APPELLANT DENIED A TRIAL BY JURY.

Mr. Paul did not demand a jury trial under Chapter 22, Session Laws, Alaska 1925, because he was not advised at any time during the proceeding before Judge Harding that he was on trial for contempt. Had he been so advised, after being personally denounced by the irate judge for eight pages, he would have done so. The Court misled him by announcing that it was the Dalton case on trial, Pages 2 and 40, Transcript, and he was thereby lured into a false security, until the trial ended, being thereby denied a right to a jury trial.

B. POINTS AND AUTHORITIES.

Counsel respectfully submit that the real question before the appellate court in this case is whether the appellant suffered a denial of his constitutional rights to due process, to be informed of the nature and cause of the accusation, to be con-

fronted with the witnesses against him, to compulsory process for obtaining witnesses in his favor, and for time to have the assistance of counsel for his defense, and whether he was denied a fair trial on notice. If the court shall find from the record that that result followed from the action of the trial court, then we ask that the cause be reversed and the judgments against defendant be set aside as void for want of jurisdiction.

We, therefore, present that phase of the case fully.

1. ASSIGNMENTS OF ERROR RAISING CONSTITUTIONAL QUESTIONS.

Assignments numbers 1, 2, 3, 4, 5, and 6, more particularly cover the questions of denial of constitutional rights. The other assignments were intended to cover other questions of errors of law, and have been generally discussed in the consideration of the facts. None of the assignments are waived, but those relating to mere errors of law, other than the constitutional errors, are submitted on the general argument, while the following will be submitted on the more important questions.

2. HOW THE COURT MISLED THE DEFENDANT.

The record shows, quoting from Judge Harding's opening sentence in his final Order Reciting

Contempt, that:

> "On February 23rd, 1929, this matter came on for hearing before the Court in open court and in the immediate view and presence of the court, upon the petition of Maxfield Dalton for a Writ of Review, which petition was entitled 'In the matter of the Application of Maxfield Dalton for a Writ of Review,' and had theretofore, towit, on February 13, 1929, been filed by William L. Paul, etc."

Judge Harding's opening statement in this case on page 2 of the Transcript, was:

> "The Court: The application for the Writ —for an order allowing a writ of review is before the court for hearing."

Mr. Paul, attorney for Dalton, being present, arose and said:

> "Mr. Paul: I wish again to ask leave of the court to continue the case in order that I may make an amended petition, some of the language might be changed."
>
> Page 2, Transcript.

No answer was returned to this courteous request of counsel and the judge began eight pages of abuse and intimidation.

We submit that this language of the trial judge can have but one meaning—that the Dalton matter was on for hearing. Mr. Paul had no intima-

tion that he was on trial for contempt, or anything else—he was misled by the court's words. We further submit, candidly, that the only matter in the whole record fairly relating to the case of Dalton's application is the first statement above quoted from Judge Harding's announcement, and his last statement on page 39, Transcript, after Mr. Paul had been thoroughly grilled and tried, as follows:

> "The Court: I will take this matter under advisement. The request to file an amended petition for the writ will be granted. That was your application, to file an amended writ?
>
> Mr. Paul: Yes, your Honor."

Every shred of the testimony, evidence and proceedings in the record, from page 2 to 39, Transcript, relates only to and was intended to relate only to the trial of William L. Paul for contempt of Court for sending the letter of Feb. 6 with the petition for writ of review to Judge Harding in his Juneau chambers.

No notice, affidavit of merits, order to show cause, or any other process was served upon or otherwise given to Mr. Paul of this trial. He was solemnly assured by the judge from the very seat of justice that it was the Dalton case that was on for hearing.

We also call the court's attention to the statement of the trial judge above quoted—"I will take this matter under advisement"—he did and as a conclusion wrote and put in the record his Order Reciting Contempt—a judgment finding the defendant guilty of contempt on two counts!

Not only was the defendant not given notice—he was misled by the very words of the trial judge, both at the opening and at the closing of the testimony.

The trial judge announced that it was the trial of the Dalton civil case—yet the United States District Attorney took forcible charge of conducting the trial—called Dalton as the government's first witness, and before the eye of the trial judge laid the foundation of the contempt case against a helpless young lawyer against whom no charge or accusation had been laid, agreeably to the provisions of Section 1444, Comp. L. Alaska, 1913, or any other law. We submit that it was a subtle, dangerous and successful assault upon the constitutional rights of a citizen.

Whether or not this method of procedure on the part of the prosecution was intended to entrap the unsuspecting young lawyer into repeating the offending clause in the petition for a writ of review in the immediate view and presence of the judge while holding court, so as to give the court

a supposed jurisdiction and authority to punish him summarily for direct contempt under the first subdivision of section 1441, Comp. L. Alaska, 1913, is a fair matter for consideration, but that result certainly followed from the methods pursued.

Will those methods be allowed to bar the defendant from his rights under the Constitution and laws of the United States to notice and a fair trial, to time for preparation and time to secure witnesses for his defense?

3. The FIRST ASSIGNMENT OF ERRORS.

We think the various statements contained in the first assignment of errors correctly state the fair conclusions upon the facts as well as the law, and we quote them here, also, as fairly representative of the conclusions which we wish the court to reach.

I.

The court had not jurisdiction to try this cause and at no time acquired jurisdiction over the defendant as required by the Constitution and laws of the United States, more particularly the Fifth and Sixth Amendments thereof in this:

(a) The defendant's conviction was had without due process of law, in that no accusation or charge of any kind was preferred or filed against him, either by way of affidavit, or otherwise.

(b) That no notice of any proceeding against him was ever given defendant and he had no knowledge of any proceeding against him at the time of the rendering and making of the pretended judgment herein.

(c) That the record herein fails to show that the defendant, at any time, committed any offense against the laws of the United States or the Territory of Alaska.

(d) That he was denied the assistance of counsel in his defense and denied the common law right of purging himself by his oath, of contempt, if any had been committed.

Page 90, Transcript.

Fifth Amendment Constitution, U. S.

Sixth Amendment Constitution, U. S.

Cooke v. United States, 267 U. S. 517, 69 L. Ed. 767.

Michaelson v. United States 266 U. S. 42, 69 L. Ed. 162.

Craig v. Hecht, 263 U. S. 255, 68 L. Ed. 293 (301).

Hovey v. Elliott, 167 U. S. 409, 42 L. Ed. 215.

Windsor v. McVeigh, 93 U. S. 274, 23 L. Ed. 914.

Ex Parte Robinson, 86 U. S. 505, 22 L. Ed. 205.

Ex Parte Bradley, 74 U. S. 364, 19 L. Ed. 214.

The lamented District Judge who presided in the First Division of Alaska recently, in a carefully prepared opinion in the case of In re Stabler, 7 Alaska, 186, laid down the rules necessary to differentiate between the degrees of contempt under the provision of the Alaska Statute, secs. 1441-1455, Compiled Laws of Alaska, 1913. He divided contempts in this jurisdiction into two classes, which he designated as (1) "direct contempts," and (2) "constructive contempts" and said further:

> "This distinction between a direct contempt and a constructive contempt is confirmed by our statute, in that it is provided (Section 1443, Compiled Laws) that, when a contempt is committed in the immediate view and presence of the court, it may be punished summarily, for which an order must be made, reciting the facts as occuring in such immediate view and presence of the court, determining the person proceeded against is thereby guilty of contempt, and, in section 1444, that in other cases, the proceeding must be initiated by an affidavit presented to the court upon which an order may be issued to show cause, or a warrant of arrest, and in such case testimony shall be adduced, as in criminal cases."

The course of procedure followed by the prosecution in this case, and the final judgments against the appellant, can only be sustained upon the theory that the court below entertained jurisdiction to proceed against the defendant as for a "direct contempt" under the first subdivision of Sec. 1441, Comp. L. Alaska, 1913—that is for—

> First. Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to impair its authority or to interrupt the due course of a trial or other judicial proceeding.

It being certain that no process required by Sec. 1441—no affidavit—no order to show cause—no notice of accusation or hearing, was given to the defendant requiring him to appear before the court at Ketchikan, and defend, we respectfully submit the following propositions:

I.

That the single act of forwarding through the United States mails, from Ketchikan to the judge in his Juneau chambers, the letter of Feb. 6 with the petition in the Dalton case enclosed, did not constitute a direct contempt "of the judge while holding court."

II.

That the said letter and petition so forwarded did not constitute "disorderly behavior," or " con-

temptuous behavior" or "insolent behavior toward the judge while holding the court."

III.

That "direct contempt" under the provisions of the first subdivision of Sec. 1441 can be the basis of punishment for contempt only when it is done "toward the judge while holding the court, tending to impair its authority or to interrupt the due course of a trial or other judicial proceeding."

IV.

That such "direct contempt" can only arise when in addition to the acts constituting the direct contempt described in section 1441, it "is committed in the immediate view and presence of the court or officer."—Section 1443.

V.

That the offense, if any, perpetrated by sending the letter and petition to Jurge Harding was completed, concluded and ended when he received the letter in his Juneau chambers, for the appellant made no further move to extend that act.

VI.

That every additional act in relation to the matter subsequent to the receipt of the letter and petition by Judge Harding on Feb. 13, in his Juneau chambers, was done by those officials engaged in the prosecution of the appellant, and for their acts

he cannot under any lawful theory, be convicted for contempt.

VII.

That no word or act of appellant at his trial before Judge Harding on Feb. 23, can be classed, by any fair construction, as "disorderly behavior," or "contemptuous behavior," or "insolent behavior"—"toward the judge while holding the court, tending to impair its authority or to interrupt the due course of a trial or other judicial proceeding." His every act and word during that trial was orderly, respectful and courteous, notwithstanding the unexpected treatment and trial he met with from the prosecution.

VIII.

That the Dalton affidavit of prejudice, upon which the second judgment is based, was made and certified on Feb. 25, two days after Mr. Paul's trial on Feb. 23; he had no notice of any kind that it would be considered by Judge Harding as a ground for contempt; the finding and judgment on that ground are clearly based on a mistake by the Judge in examining the record, and the matter is so inconsequential and immaterial in character as to afford no support to the findings and judgment based thereon; and, anyway, this court has heretofore held that the filing of an affidavit of prejudice, if in respectful manner and language,

does not constitute contempt—Tjosevig v. the United States, 255 Fed. 5—and Mr. Paul relied on that adjudication in preparing it.

IX.

Wherefore, as we view the law and the facts in the case, the appellant was actually tried on Feb. 23, only for the single act of sending the letter and petition to the judge in chambers, and that without the service of any affidavit, order to show cause, notice or process of any kind.

X.

That the secrecy with which the case against appellant was prepared, and the statement of the trial judge that:

> "The Court: The application for the writ —for an order allowing a writ of review is before the court for hearing,"
>
> Page 2 and 40, Transcript.

wholly misled the defendant to his great prejudice and whereby he was drawn before the court, as he believed, in the trial of the Dalton case only, and was there actually tried for the crime of contempt, without his knowledge or any warning or notice, and was thereby (1) compelled to be a witness against himself, (2) was deprived of his liberty and property without due or any process of law, (3) was not informed of the nature and cause of the accusation against him, (4) was not con-

fronted with the witnesses against him, (5) was not allowed to have compulsory or any process for obtaining witnesses in his favor, and (6) was denied the assistance of counsel for his defense.

The leading case in the United States jurisdiction applicable to the case at bar is—

> Cooke v. United States, 276 U. S. 517, 69 L. Ed. 767.

This case seems to counsel for appellant to be on all fours with the case at bar, and to definitely settle the constitutional questions raised here. In that case, unlike this, there was some notice given to the accused, while in this there was none. There a letter was written to the judge of the U. S. District Court on Feb. 15, which contained the clause upon which the contempt was based, and we quote from the record stated in that case:

> "Eleven days after this, on the 26th of February, the court directed an order to be entered with a recital of facts, concluding as follows: 'Therefore, since the matters of fact set forth herein are within the personal knowledge of the judge of this court, that said letter as a whole is an attack upon the honor and integrity of the court, etc. . . . it is ordered that an attachment issue, etc.'" (521).

The parties were arrested and brought before the judge.

> "Mr. Clay Cooke said he had not known of the attachment until that morning, that he would like time to prepare for trial and get witnesses for their defense" etc. (522).

In the case at bar not even an attachment was issued, no notice of any kind was given, and the appellant was misled by the statement of the judge that another case was on trial, and during the whole of his trial he was not advised that he was on trial for contempt, so thereby he was lulled into a false security, though the judge was actually trying him for contempt. He had no notice that he was on trial, and was not accorded any hearing on contempt.

No act or word of contempt was done or said by appellant on that proceeding—he was tried, secretly—to him—without notice, for sending the letter of Feb. 6 with the petition to the judge in Juneau chambers. In the Cooke case, the Chief Justice said in the court's opinion:

> "Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony relevant either to the issue of complete exculpation or in extenuation of the offense in miti-

gation of the penalty to be imposed," citing authorities. (537).

"In such a case and after so long a delay, it would seem to have been the proper practice, as laid down by Blackstone, 4 Commentaries, 286, to issue a rule to show cause. The rule should have contained enough to inform the defendant of the nature of the contempt charged. See Hollingsworth v. Duane, Wall St. 141, Fed. case No. 6617. Without any ground shown for supposing that a rule would not have brought in the alleged contemnors, it was harsh under the circumstances to order the arrest." (537).

After the court elicited from the petitioner the admission that he had written the letter, the court refused him time to secure and consult counsel, prepare his defense, and call witnesses, and this although the court itself had taken time to call in counsel as a friend of the court. The presence of the United States District Attorney was also secured by the court on the ground that it was a criminal case." (538).

And in its application to the action of Judge Harding in bringing in a new count based on the alleged filing of the affidavit of prejudice two days after the trial of Mr. Paul, and finding him guilty of a second contempt on that, the following ruling seems to be conclusive: (538)

> "On the other hand, when the court came to pronounce sentence, it commented on the conduct of both the petitioner and his client in making scandalous charges in the pleadings against officials of the court, etc. . . . It was quite clear that the court considered the facts thus announced as in aggravation of the contempt. Yet no opportunity had been given to the contemnors even to hear these new charges of the court, much less to meet or explain them, before the sentence. We think the procedure pursued was unfair and oppressive to the petitioner."

The Chief Justice concludes the opinion of the court with laying down the fair rule that when the judge is attacked by contempt, as in that case, he should call in another judge to hear the contempt (539).

> "All that we can say upon the whole matter is that where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place. Cornish v. United States, 299 Fed. 283, 285; Toledo Newspaper Co. v. United States, 150 C. A. C. 636, 237 Fed. 986, 988."

In the case at bar, Judge Hill, of the Third Division, was in Ketchikan, to hold court there at the request of Judge Harding specially to try cases in

which Judge Harding was disqualified, including the Dalton case.

The Cooke case is supported in principle by the cases above cited in connection with it, but it seems to counsel for appellant to conclude every question involved, upon facts almost identical with those in the case at bar, and for that reason they are not presented in extenso.

What is due process of law, in a contempt case, is adjudicated in Hovey v. Elliott, 167, U. S. 409, 42 L. Ed. 215 (221). The sylabus reads: (417)

> "Due process of law signifies a right to be heard in one's defense," and the court said, (419) "If the power to violate the fundamental constitutional safe guards securing property exists, and if they may be with impunity set aside by the courts on the theory that they do not apply to proceedings in contempt, why will they not also apply to proceedings against the liberty of the subject? Why should not a court in a criminal proceeding deny to the accused all right to be heard on the theory that he is in contempt, and sentence him to the full penalty of the law? No distinction between the two cases can be pointed out. The one would be as flagrant a violation of the rights of a citizen as the other, the one as pointedly as the other would convert the judicial department of the government into an engine of oppression, and would make it destroy great constitutional safe guards."

The general rule is thus stated by the Supreme Court in the case of Windsor v. McVeigh:

> Wherever one is assailed in his person or property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.
>
> That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject matter . . . A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether."
>
> Windsor v. McVeigh, 93 U. S. 274, 23 L. Ed. 914 (916).

And in the case of Ex parte Bradley the Supreme Court said:

> "Without pursuing this branch of the case

further, our conclusion is:

* * * *

Second: That they possessed no power to punish him, upon an exparte proceeding, without notice or opportunity of defense or explanation for misbehavior, or for any particular instance of the same generally in his office as attorney of the court, as claimed in the words of the return, 'irrespective of the doctrine of contempts.' "

Exparte Bradley 74 U. S. 374, 19 L. ED. 214 (218).

While the record in this case shows that Mr. Paul was compelled to testify and to offer his wife as a witness, the record also shows without doubt, that such testimony was extorted in the hearing of a civil case, "In the Matter of the Application of Maxfield Dalton for a Writ of Review," and not upon any charge, accusation or proceeding against him for contempt, and not upon any notice to him that any contempt case was then pending, but in which he was adjudged to be guilty and the fines inflicted.

Pages 2 and 40, Transcript.

4. THE 2nd AND 3rd ASSIGNMENTS OF ERROR.

Both these assignments seem to be covered by the argument and authorities in support of the

first assignments and will be submitted therewith.

5. THE 4th ASSIGNMENT OF ERROR.

Sec. 1539, Comp. L. Alaska, 1913, provides that a judge shall not act as such—

> "Fourth, Where he has been attorney in the action or proceeding for either party."

though the section further provides that—

> "In the cases specified in subdivisions three and four the disqualification may be waived by the parties and shall be deemed to be waived unless an application be made as provided in the code."

Mr. Paul waived this objection in so far as he requested Judge Harding to act in the matter by his letter of Feb. 6 carrying the petition to the judge in chambers in Juneau. At that time he did not know and was unsuspicious of the feeling of the judge against him (page 85, Transcript), though he did know the judge was generally disqualified, for he informed him in the letter that "I am requesting that you sign the same in order that the matter may come up before Judge Hill in March."

Judge Harding, also, had a duty to perform under the mandatory provisions of the statute of Alaska separate and apart from any duty or action of the attorney, for he knew the statute used

the words "shall not act as such" in that case, and he knew much better than Mr. Paul did at that time his own prejudice and bias in the case. It would have been in line with the spirit of the statute which gave him that command, and it would have been just and proper if he had suggested his own disqualification, and either returned the petition to Mr. Paul, without any action on it, or if he thought an intentional contempt was offered to the judge by the phraseology therein, to have instructed the district attorney to prepare an affidavit and an order to show cause, and present the matter to Judge Hill, who was then due in his district to hold court in his place in such matters. But he did not—he adopted the methods and proceedings shown in the Transcript. We submit this point without further argument, upon the mandatory words of the statute and the evident inexperience, good faith and lack of suspicion of the attorney with whom he had to deal.

6. THE 5th AND 6th ASSIGNMENTS OF ERROR.

The 5th assignment is sufficiently covered by the argument under assignment number one.

The 6th assignment is generally covered by the argument under assignment number one, except the last clause therein.

Mr. Paul requested time to go to his office and

get the correspondence which he had from Dalton about the preparation of the petition in the months of November and December, 1928. He was given 20 minutes only (page 8, Transcript), and in that time he had to be present in court to receive a verdict in a jury case where he was an attorney. At page 27, Transcript, he said:

> "I have made a search for those letters in my office but in the short time allowed by the court I am not able to produce them."
>
> Page 27, Transcript.

He requested time for preparation, etc.:

> "Mr. Paul: I am willing to be examined, but I think the court might set another time—as long as the proceeding is taking this direction—for me to prepare myself."
>
> Page 7, Transcript.

If the court had fairly granted him time to prepare himself, even in the Dalton case then said by the judge to be on trial, he would have found those letters and produced them in court. Assignment of error number six alleges error because "it appears that the allegations were prepared and signed before the then United States Attorney was appointed judge."

Page 92, Transcript.

This fact could have been shown by those letters, and would have demonstrated that the petition was not intended when it was made, signed

and certified as any contempt "toward the judge while holding the court," for he was not then judge. But that evidence was not produced at the trial owing to the refusal of Judge Harding to grant the time necessary for preparation—and it is that fact which is in the record and which we complain about. If that evidence had been found and produced it would have conclusively shown that there was no intent on Mr. Paul's part to commit any contempt of court when the petition was prepared, signed and certified, because Mr. Harding was then the U. S. Attorney, and not the Judge, and he was entitled to show that fact, but was denied the right to do so for the want of sufficient time.

Did the petition presented to Judge Harding by the letter of Feb. 6 as stated in the record, constitute contempt "toward the judge while holding the court, tending to impair its authority or to interrupt the due course of a trial or other judicial proceeding"? We think not. It was a mere pleading, and the clause objected to by Judge Hardin was a necessary allegation to a good pleading and contained no charge of any offensive character against the judge while holding court or at all. Is the judge treated contemptuously when only the United States Attorney was mentioned? Did the words used tend to impair the authority of the court? Certainly not. Did they tend to interrupt

the due course of a trial? Certainly not.

We candidly submit to the court that the defendant was denied the right to notice, to due process of law, to be informed of the nature and cause of accusation, to have time to prepare, to process for witnesses, and to the assistance of counsel for his defense, and we respectfully submit this brief trusting that our views may meet with the approval of this court.

JAMES WICKERSHAM,
HENRY RODEN,
Attorneys for Appellant.

NO. 5814

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HARRY NIXON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE TERRITORY OF ALASKA, DIVISION NO. 1.

HOWARD D. STABLER,

United States Attorney,

For Appellee.

INDEX.

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APPELLEE'S BRIEF

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE TERRITORY OF ALASKA, DIVISION NO. 1.

STATEMENT.

On March 25, 1929, at Ketchikan, Alaska, Harry Nixon, this appellant, was jointly tried with his grown son Al Nixon for a violation of the Alaska Bone Dry Act committed at Ketchikan on September 24, 1928. Harry Nixon was convicted; Al Nixon was acquitted.

According to appellant's statements in what purports to be a typewritten copy of a bill of exceptions served upon us (the transcript was not printed),

which does not contain any of the evidence in the case, it appears that on September 24, 1928, federal officers went to the Ketchikan hotel with a search warrant authorizing a search "of room 29 and a room immediately opposite said room 29 and across the hall of said hotel from said room 29". The officers first went to room 29 where they found the door open and Al Nixon lying on the bed. (P. 3 Bill Exceptions) Harry Nixon who was then and for some time had been occupying the room was temporarily absent from the premises. (P. 3 Bill Exceptions) Search of room 29 with the warrant disclosed three small glasses and a number of corks and two large drinking glasses. The officers then proceeded to room 35 across the hallway from room 29 where they found and seized 72 bottles of beer and 12 bottles of whisky, a cork screw, a funnel, a bag of corks, a bag of empty beer bottles and some whisky flasks, whereupon the officers returned to room 29 and in room 29 arrested Al Nixon for the unlawful possession of the articles seized in room 35 (p. 3 typed bill of exceptions). Immediately after arresting Al Nixon in room 29, and contemporaneously therewith (p. 1 Brown's affidavit in support of answer to petition to quash search warrant incorporated in bill of exceptions by reference) the officers then and there searched him and found on his person the key to room 29, which was not received in evidence; and then and there made further search of room 29 and found concealed in the bed on which Al Nixon had been lying a key fitting the

Sargent lock on the door of room 35 which was received in evidence. Harry Nixon was arrested the following day.

Appellant Harry Nixon expressly disclaimed any connection with room 35 (p. 3 typewritten copy of bill of exceptions; and page 1 of a typewritten copy of affidavit attached to bill of exceptions and incorporated by reference made by appellant in support of his motion to quash the search warrant).

The plan of the following argument is, first, argument upon the point that no search warrant was necessary for the seizure of the articles found in room 35, or for the key to room 35 found in room 29; and the record does not show that the remaining articles seized were received in evidence; and if they were, their evidentiary value was slight and no prejudice is shown; and second, argument that the search warrant was valid and seizure of all of the articles was lawful by virtue of it.

ARGUMENT.

1. As appellant disclaims any connection with room 35, or the beer, whisky, cork screw, funnel, corks, empty beer bottles and the whisky flasks found there, he cannot be heard to complain of an illegal search of room 35; or the use in evidence against him of the liquors and other articles found in such room.

Nielson v. U. S. (CCA-9) 24 Fed. (2nd) 802,

Armstrong v. U. S. (CCA-9) 16 Fed. (2d) 62,

Lewis v. U. S. (CCA-9) 6 Fed. (2d) 222,

Driskill v. U. S. (CCA-9) 281 Fed. 146.

In the Armstrong Case, this court said:

> "Nor does the record show that the defendant made any claim either to the premises searched or the property seized, and in the absence of such claim, cannot urge unreasonable search upon which to base a constitutional right."

In the Lewis Case, this court said:

> "Plaintiffs in error in their petition to suppress made no claim to the premises searched or to the property seized, and, in the absence of such a claim, they are in no position to raise the objection that the search was unreasonable or unauthorized, or that their Constitutional rights were invaded."

There remains then the question of whether the articles seized in appellant's room 29 were seized and introduced in evidence against him in violation of his Constitutional rights.

When the officers first went to room 29 they found there and seized three small glasses and a number of corks and two large drinking glasses. The seizure of these articles could only be sustained by authority of the search warrant. After finding the intoxicating liquors and other articles in room 35 the officers returned to room 29 and there arrested Al Nixon for the unawful possesssion of the intoxicating

liquors in room 35, and immediately searched his person and again searched room 29, and upon this search and not before found the key to room 35 concealed in the bed in room 29 on which Al Nixon had been lying.

While seizure of the three small glasses, corks and two large drinking glasses could only be sustained by virtue of the search warrant, the same result does not follow as to the key to room 35 seized contemporaneously with the arrest of Al Nixon in room 29. The seizure in room 29 of the key to room 35 under the circumstances related was lawful, and no search warrant was necessary; and its use in evidence was lawful.

Nordelli v. U. S. (CCA-9) 24 Fed. (2d) 665.

Marron v. U. S. (CCA-9) 18 Fed. (2d) 218; aff. 275 U. S. 192, 48 Sup. Ct. 74.

Sayres v. U. S. (CCA-9) 2 Fed. (2d) 146.

In the Marron Case, it appeared that Marron was the lessee of the premises searched with a search warrant, but was not present when the search was made. Birdsall was in charge, and was arrested for crime committed in the presence of the officers. A ledger and bills were seized and put in evidence against Marron who had petitioned their return and suppression. The Supreme Court held the seizure of the ledger and bills not justified by the search warrant, but held their seizure lawful by virtue of seizure contemporaneously with the arrest of Birdsall.

The Supreme Court in affirming the judgment against Marron said:

> "The officers were authorized to arrest for crime being committed in their presence and they lawfully arrested Birdsall. They had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise.
>
> . . . It follows that the ledger and bills were lawfully seized as an incident of the arrest."

In the Nordelli Case, this court said:

> "The officer was within his rights, and it was his duty to make an arrest of those defendants, and that thereupon the law gave him, as well as the other officers, the right to search the defendants or either of them, and also to search the room in which the arrest was made, and also the rest of the house which was occupied and used by them at the time."

Even though we should assume that the remaining articles seized in appellant's room 29, to wit, the three small glasses, a number of corks, and two large drinking glasses, were seized unlawfully by the officers, it does not follow that they were received in evidence against him in violation of his Constitutional rights. To justify appellant's contention made that this court ought to reverse this case, he ought to point out particularly and convincingly, not that these particular articles were seized unlawfully, but that they were prejudicial and received in evidence against the appellant in violation of his Constitutional rights. It would seem impossible for

the court, under the present record before the court, to determine whether they were offered and received in evidence at all; and, if they were received, whether they were sufficiently prejudicial to justify reversal.

Appellant's motions to quash and suppress were directed to all of the articles seized in rooms 29 and 35 by virtue of the search warrant. No specific mention was made of these particular articles, and, as we remember the case, no particular significance was attached to them because of their slight evidentiary value. The key to room 35 seized in appellant's room 29 was the particular thing appellant endeavored to have suppressed. Having disclaimed any connection with room 35, appellant did not seriously urge the suppression of the articles seized in room 35.

Without at least some of the evidence before this court showing the admission of these articles in evidence, and the particular objections made and rulings thereon, it is believed impossible for the court to determine whether these particular articles were received in evidence at all; or if they were received, whether they were received specifically, or generally with the other exhibits which for the reasons just stated were properly received; or what specific objections, if any, were made to them in evidence; or what the court's ruling was, and whether exception was properly preserved; or if they were introduced in evidence improperly, whether the effect was

sufficiently prejudicial to warrant reversal. The court should not have to assume any of these things. It is appellant's duty to make them clear. According to our recollection, but which we should not have to depend upon, we seriously question whether these particular articles were received at all.

In the case of *Simpson v. U. S.* 289 F. 188 and in *Marron v. U. S.* 18 Fed. (2d) 218, this court said:

> "In reviewing a judgment in an appellate court, the burden is on the plaintiff in error to show that error in the admission of testimony was prejudicial."

It is respectfully contended that the seizure of the articles in room 35 and their introduction in evidence against appellant was lawful because appellant expressly disclaimed any connection with room 35 and the articles seized therein; that the seizure of the key to room 35 in room 29 was lawful as incidental to the lawful arrest of Al Nixon, the seizure being lawful, its introduction in evidence was lawful; and that if the remaining articles seized were introduced in evidence, which fact is not shown by the record, their evidentiary value was slight, and prejudice has not been shown, and therefore, the judgment of the lower court ought to be affirmed.

2. The search warrant was valid. Appellant contends that the evidence against him was obtained through search of his premises with a void search warrant; void in that there was not sufficient and

competent evidence before the magistrate to show probable cause for issuing it.

The search warrant authorized a search of "room 29 of the Ketchikan hotel . . . and a room immediately opposite said room 29 and across the hall of said hotel from said room 29," and was based upon the affidavit of E. M. Harrold made before a notary public, and the affidavit of Deputy U. S. Marshal C. V. Brown made before the magistrate who issued the warrant. Both affidavits were submitted to the magistrate, and both were considered by him prior to his issuance of the warrant. The statement in appellant's brief (p. 3) that "Harrold was never before the commissioner who issued the search warrant. This is undisputed", and the statement (p. 7), "The search warrant refers to the affidavit of Harrold only, which it is conceded was not taken before the commissioner," should not be construed so as to infer that the commissioner did not have before him and consider in finding probable cause for the issuance of the warrant the affidavit made by Harrold, as well as the affidavit made by Brown. The commissioner had before him and considered both affidavits in finding probable cause for issuing the warrant.

The search warrant bearing the date September 24, 1928, copy whereof is incorporated in the bill of exceptions, shows on its face that the affidavit of Harrold was considered by the magistrate, for on the face of the search warrant are the words, "proof

by affidavit having this day been made before me by E. M. Harrold", etc. Brown's affidavit for search warrant dated September 24, 1928, also incorporated in the bill of exceptions shows on its face that it was taken before the same magistrate who issued the search warrant based upon Harrold's affidavit. This, we think, clearly shows that the magistrate had before him and considered both affidavits in finding probable cause. (No transcript of the record in this case has been furnished us, and as the fact of the magistrate having before him and considering both affidavits does not clearly appear in any of the appeal papers of which copies were served upon us, a certified copy of the magistrate's affidavit dated March 29, 1929, submitted with appellee's answer to the petition and motion to suppress evidence and quash search warrant showing the fact will be filed in the case, and printed in this brief following the argument.)

The affidavit of E. M. Harrold sworn to before a notary public, which was submitted to the magistrate by Mr. Brown with his own affidavit, was as follows:

> "That on Sunday September the 23rd, 1928, I went to the Ketchikan hotel, situated . . . and in room 29 met a man known to me as Al, a young man, and another man known to me as Harry Nixon, and said Harry Nixon sold me a pint flask of whiskey for which I paid him $2.50 cash. He got this whiskey directly across the hall in a room without any number on, but

this room is directly opposite room 29, and on the right hand side of the hall going to room 29 from the stairs."

The affidavit of C. V. Brown, also submitted to the magistrate, was as follows:

"... And this deponent further says that on the 23d day of Sept. 1928, Harry Nixon sold to E. M. Harrold a pint flask of whiskey for which said E. M. Harrold paid said Nixon the sum of $2.50, and that he therefore has, and there is, probable and reasonable cause to believe, and that he does believe and states as true, that said Harry Nixon now has concealed in the following described premises, viz. room 29 and the room directly opposite said room 29 in the Ketchikan hotel . . . alcoholic liquors . . ."

Appellant contends the affidavit of Harrold is a nullity because sworn to before a notary public; and that Brown's affidavit is a nullity because it states nothing but conclusions.

In the case of *Hawker v. Queck* (CCA-3) 1 Fed. (2d) 77, Cer. den. 45 S. Ct. 99, 266 U. S. 621, a situation exactly similar to that in the present case arose. McClelland and Gibson made affidavits before notaries public showing sales of liquor. The court said:

"These affidavits were severally sworn to before notaries public by McClelland on June 30, and by Gibson on July 1, 1920, and on July 17, Connors, a prohibition agent appeared before Roger Knox, the United States Commissioner, and made oath to an affidavit for a day time

search warrant, reprinted from the record in the margin, in which, as will be seen after alleging that he has good reason to believe that 'in and upon the premises of Harry P. Queck, at ..... there has been and is now located and concealed a large amount of intoxicating liquor, to wit, whisky,' etc., the affidavit then states 'that the information obtained by your affiant in relation to the sale of liquor by the said Harry P. Queck on the 26th day of June, A. D. 1920, was obtained from affidavits made by William McClelland and Nelson Gibson.' On the same day the commissioner issued a day search warrant, wherein was recited the appearance of Gibson, the prohibition agent, before the commissioner, his oath, and reduction to writing of the agent's belief of whisky on the premises, the grounds of his belief, viz that 'the information obtained by said J. W. Connor in relation to the sale of liquor by the said Harry P. Queck was obtained by the said J. W. Connor, prohibition agent, from affidavits made by William McClelland and Nelson Gibson.' Upon this warrant a search was had . . . "

"Being of the opinion, then, that the record papers before the commissioner and the court showed probable cause for the issue of the warrant, the decree below, holding it invalid, is reversed."

In the foregoing case the court also said:

"We may further state that, while it was suggested at the argument that there was nothing to show that the affidavits of McClelland and Gibson were produced before the commissioner, we may add that, apart from the affidavits themselves being in the printed record, and the reference to them, both in the affidavit of Connor taken before the Commissioner and

> in the warrant itself, the court at bar inquired of counsel as to the facts, and later on was furnished with information that Gibson's and McClelland's affidavits had been before the commissioner when he issued the warrant, and before the court when it passed upon its legality."

This court followed the case of *Hawker v. Queck* in *Nordelli v. U. S.* 24 F. (2d) 665, 667, and said:

> "In *Hawker v. Queck* (CCA) 1 F. (2d) 77, it was held that an affidavit by a prohibition agent that he had good reason to believe and did believe that on premises designated liquor would be found, and that his information was obtained from affidavits made by named persons, which were before the magistrate and which showed the purchase of whisky, was held sufficient to show the existence of probable cause to legalize a search warrant. Certiorari was denied."

The affidavit of United States Commissioner Kehoe, printed in this brief at the conclusion of the argument, (a certified copy thereof has been filed in the case by appellee) shows that Brown presented to him the affidavit of E. M. Harrold, and at the same time made an affidavit himself, and that in finding probable cause he considered both affidavits. Counsel's statement (p. 4 Brief) that Harrold's affidavit was never even seen by the commissioner in connection with the application for the warrant, is not correct.

Such being the case, the *Hawker v. Queck* case is practically in point with the facts of the case at bar.

There is this difference, however. Brown did not state in his affidavit that he based his information upon the affidavit of Harrold. And it was not necessary that he should make such a statement for it appears that Brown had direct information of the facts alleged in his own affidavit.

When this matter came before the trial court upon the petition to quash the search warrant, an answer to the petition was made and filed by appellee, which answer was supported by Brown's affidavit dated March 20, 1929. This answer and affidavit is referred to in the typewritten bill of exceptions served upon us as "Answer to petition to quash search warrant and affidavit in support thereof". In this bill of exceptions the further statement is made that the same "are hereto attached and made a part hereof".

> It appears by this affidavit made by Brown that,
>
> "Brown ..... gave E. M. Harrold on September 23, 1928, the sum of $5.00 for the purchase of whisky; that he watched said Harrold go to the Ketchikan hotel and emerge therefrom in a few minutes; that Harrold thereupon gave him a bottle of whisky and the change; and immediately thereafter made an affidavit reciting the facts of said sale to him which affidavit is now on file in the above entitled cause. That affiant thereupon executed affidavit for search warrant as appears by the files herein ....."

Therefore, when Brown in his affidavit made before the United States Commissioner the following day said,

> "that on the 23d day of Sept. 1928, Harry Nixon sold to E. M. Harrold a pint flask of whisky for which said E. M. Harrold paid said Nixon the sum of $2.50, and that he therefore has, and there is, probable and reasonable cause to believe and that he does believe and states as true .....,"

he stated facts within his own knowledge, excepting probably the fact of who made the sale to Harrold, and he learned that fact from the sworn affidavit of Harrold.

Both affidavits are positive in form. They were both submitted to the magistrate; and both were considered in finding probable cause. We submit the showing of probable cause was sufficient to justify the issuance of the warrant.

The warrant commands a search of room 29 from which the key to room 35 was taken; and from which the three small glasses, a number of corks and two large drinking glasses were taken. It also commanded a search of a room opposite 29, which proved to be room 35, from which the whisky, beer and other articles were taken.

Therefore, the seizure being lawful by virtue of a valid search warrant, they were properly received in evidence.

Appellant also contends that the trial court erred and abused its discretion in overruling his motion for a new trial in which the point was made that Deputy Marshal Caswell who procured the sign-

ing of the Harrold affidavit and who was very active in the prosecution of the case, and who had charge of the execution of the search warrant, was permitted to take charge of the jury as bailiff after they had been deliberating for twenty-four hours; and that he had an opportunity to, and possibly did, influence one or more of said jurors.

The record shows that the court heard and considered the motion for new trial, and supporting affidavit submitted therewith, in which the foregoing point was made, and in its discretion overrued the motion. It is believed the court will follow its own precedents in disposing of this assignment.

In *Boyd v. U. S.* (CCA-9) 30 Fed. (2d) 900, this court said:

> "A motion for a new trial is addressed to the sound discretion of the trial court, and the granting or refusing of the same is not assignable as error, where, as here, the court considered all the affidavits in support of the motion, and after full hearing denied it in the exercise of a sound discretion."
> Similar rulings were made by this court in,
>
> *Brown v. U. S.* (CCA-9) 9 Fed. (2d) 588, cer. den. 46 S. Ct. 348.
>
> *Clements v. U. S.* (CCA-9) 297 Fed. 206.

The assignment is not well taken for another reason. The only showing made in support of the assignment is the affidavit submitted to the court with the motion. This affidavit was made by appellant's attorney in which the statement was made that

> "Caswell as such bailiff had an opportunity to, and possibly did, communicate with and influence one or more of said jurors."

No showing is made that communication was so had with any juror, or that any juror was so influenced; and no actual prejudice to appellant is shown, or even intimated.

Statement is made in the affidavit that Caswell, as shown by his testimony (which is not before the court) was greatly interested in securing the conviction of the defendant; but that fact cannot be determined without the testimony. Statement is also made that Caswell was interested in the case because he procured the signing of the Harrold affidavit; but the record shows that Brown and not Caswell had Harrold make and sign the affidavit. We submit there is no showing that Caswell had any particular interest in the case; that, at most, the court's appointment of this particular officer as bailiff was an irregularity within the meaning of the rule stated in 17 Corpus Juris 354, section 3714:

> "Mere irregularities in the custody of the jury during the trial which do not operate to defendant's prejudice will not authorize a reversal."

Appellant cites the case of *Johnson v. U. S.* (CCA-9) 247 Fed. 92; but the facts in the Johnson case were altogether different from the facts of the case at bar. In the Johnson case the officer selected the jury in a case in which the record clearly shows his personal interest.

We submit, therefore, the assignment does not justify reversal of the judgment.

The assignment made concerning the overruling of the motion for directed verdict is not well taken.

Where motion for directed verdict was overruled and an exception noted it is essential for proper review that the bill of exceptions contain all the testimony adduced, as well as the motion and order.

Smith et al. v. U. S. (CCA-9) 9 F. (2d) 386.

Pauchet v. Bujac (CCA-8) 281 F. 962, 966.

CONCLUSION.

It is respectfully submitted therefore that such evidence as was introduced against appellant was lawfully obtained because,

(1) As appellant disclaimed any connection with room 35, no search warrant was necessary to seize the articles taken from that room; the key seized in room 29 was lawfully taken incidental to the arrest therein of Al Nixon and no search warrant was necessary to seize it; the remaining articles taken from room 29 are not shown by the record to have been received in evidence against appellant; and, if they were received, their evidentiary value was slight, and prejudice is not shown, and

(2) The evidence was obtained by a valid search warrant.

Therefore, the evidence being lawfully obtained, its introduction in evidence against appellant was not in violation of his Constitutional rights; and the judgment of the court below should be affirmed.

Respectfully submitted,

HOWARD D. STABLER,
United States Attorney.

"IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA. DIVISION NUMBER ONE. AT KETCHIKAN.

UNITED STATES OF AMERICA, *vs.* Harry Nixon.	No. 1092-KB AFFIDAVIT
United States of America, Territory of Alaska.	ss.

J. W. Kehoe, being first duly sworn, deposes and says that he is now and for several years last past, has been United States Commissioner for the precinct of Ketchikan, at Ketchikan, Alaska; that on the 24th of September, 1928, C. V. Brown presented the affidavit of E. M. Harrold, dated the 23d day of September, 1928, on file in the above entitled cause; and at the same time made an affidavit for a search warrant directing the search of room 29 and the room across the hallway therefrom, in the Ketchikan Hotel at Ketchikan; that he examined the applicant, C. V. Brown, under oath, and that in finding the existence of probable cause for the issuance of a search warrant, he had before him and considered the affidavits of both said E. M. Harrold and C. V. Brown as aforesaid, and upon such finding and determination of probable cause issued the search warrant filed in the above entitled court and cause.

J. W. KEHOE.

Subscribed and sworn to before me this 29th day of March, 1929.

JOHN H. DUNN,

Clerk of the District Court, District of Alaska, Division No. 1."

(Seal)

No. 5815

United States
Circuit Court of Appeals
For the Ninth Circuit

WILLIAM L. PAUL,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Appellee's Brief on Motion to Dismiss Appeal and on the Merits.

Upon Appeal From the United States District Court For the Territory of Alaska, Division No. One.

HOWARD D. STABLER,
United States Attorney,
For Appellee.

No. 5815

United States
Circuit Court of Appeals
For the Ninth Circuit

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STATEMENT OF THE CASE.

On March 4, 1929, at Ketchikan, Alaska, District Judge Justin W. Harding summarily adjudged the appellant William L. Paul in contempt of court, committed in the presence of the court, in two particulars, or counts, on the first whereof appellant was fined $75.00; and on the second, $100.00. Each sentence provided for appellant's imprisonment until such fines were paid, on the first not exceeding 35 days; on the second not exceeding 50 days.

Stay of proceedings pending appeal was granted by the trial court on the above date at appellant's request.

Appellant perfected his appeal to this court, and thereafter appellee filed its motion to dismiss the appeal for want of appellate jurisdiction. The motion to dismiss is hereinafter quoted.

The plan of appellee's brief is, first, a presentation of the motion to dismiss the appeal; and, second, a presentation of facts and arguments on the merits.

THE MOTION TO DISMISS THE APPEAL.

The Motion to Dismiss, duly served and noticed upon appellant's attorneys, is as follows:

> "Comes now United States of America, appellee in the above entitled court and cause, by Howard D. Stabler, United States Attorney for the First Division, District of Alaska, and by virtue of the provisions of the third subdivision of section 128 of the Judicial Code, as amended by the Act of Congress approved February 13, 1925, 43 Stat. 936, 28 USCA 225, U. S. Comp. Stat. section 1120, amended, respectfully moves the Court to dismiss for want of appellate jurisdiction the above entitled pretended appeal of William L. Paul from the final judgment and decision of the District Court for the First Division, District of Alaska, for the reason that the Constitution of the United States, nor any statute or treaty of the United States or any authority exercised thereunder, is not involved; the value in controversy exclusive of interest and costs does not exceed one thousand ($1000.00) Dollars; the offense charged is not punishable by imprisonment for a term exceed-

ing one year or by death; and said proceeding is not a habeas corpus proceeding."

ARGUMENT ON MOTION TO DISMISS.

Appellate jurisdiction in Alaskan matters is governed by the provisions of the Act of February 13, 1925, cited in the motion, the pertinent parts whereof are as follows:

> "The Circuit Court of Appeals shall have appellate jurisdiction to review by appeal or writ of error final decisions,—
>
> "Third. In the district courts for Alaska or any division thereof, and for the Virgin Islands, in all cases, civil and criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all other civil cases wherein the value in controversy, exclusive of interest and costs exceeds $1000; in all other criminal cases where the offense charged is punishable by imprisonment for a term exceeding one year or by death and in all habeas corpus proceedings. . . ."

In 1927, this court in the case of Starklof v. United States, 20 Fed. (2d) 32, under the authority of the statute just quoted, dismissed a writ of error from Alaska for want of jurisdiction upon a motion identical in form and substance with the present motion to dismiss. In the Starklof case, the appellant contended among other things that a statute of the United States was involved, and, therefore, the court had appellate jurisdiction. In the present case, appellant contends that the court has appellate jurisdiction because a Constitutional ques-

tion is involved. This last statement is based upon the following references: On page 2 of appellant's brief is the statement, "The appeal comes to this court on Constitutional grounds". See also appellant's brief page 69; and his assignment of errors number one, transcript page 90.

It appears that this case is not appealable under the Act of February 13, 1925, unless the Constitution of the United States is involved, for the statutes upon which the contempt proceedings are based are not statutes of the United States (sections 1441-1455, Compiled Laws of Alaska, which, according to the authority of the Starklof Case, are laws of the Territory and not laws of the United States); no treaty is involved; the value in controversy does not exceed $1000; the offense charged is not punishable by imprisonment for a term exceeding one year or by death; and it is not a habeas corpus proceeding.

As this court has appellate jurisdiction to review this case only in the event the Constitution is involved, it follows that the appeal ought to be dismissed for want of jurisdiction if the Constitution is not involved.

The words, "Constitution is involved", found in the Act of February 13, 1925, have been used in other statutes; and have often been construed by the courts.

Federal appellate procedure in Alaskan cases (Compiled Laws of Alaska section 1336, Comp St.

1224) prior to the Act of February 13, 1925, provided for direct appeal and error to the Supreme Court,

> " . . . in all cases which involve the construction or application of the Constitution of the United States. . . ."

Direct appeal from the district courts to the Supreme Court prior to the Act of February 13, 1925, was also provided for (Comp. St. 1215, Jud. Code section 238 as amended, Act Jan. 28, 1915),

> " . . . in all cases that involve the construction or application of the Constitution of the United States. . . ."

A study of some of the Supreme Court decisions construing the meaning of the words, "in all cases which involve the construction or application of the Constitution of the United States", leaves little doubt of what Congress intended in the Act of February 13, 1925, by the words, "in all cases, civil and criminal, wherein the Constitution . . . is involved".

The record clearly shows that in the contempt case against appellant there was no issue of fact or law, substantial or otherwise, before the trial court involving the Constitution or a Constitutional question; and, therefore, the court below did not pass upon or consider an issue of that character. It was not until after the order adjudging appellant's contempt was made that any references to the Constitution were presented in the case. These references are contained in the assignment of errors and in ap-

pellant's brief, made for the purpose of appeal. According to the authorities, the facts and record of this case do not present a situation wherein the "Constitution is involved".

In Sugarman v. U. S. 249 U. S. 182, 39 Sup. Ct. 191, the Supreme Court of the United States said:

> "Mere reference to a provision of the federal Constitution, or the mere assertion of a claim under it, does not authorize this court to review a criminal proceeding; and it is our duty to decline jurisdiction unless the writ of error presents a constitutional question substantial in character and properly raised below."

In Ansbro v. United States, 159 U. S. 695, 16 Sup. Ct. 187, the Supreme Court of the United States by Mr. Chief Justice Fuller said:

> "The jurisdiction of this court must be maintained then, if at all, on the ground that this is a case that involves the construction or application of the Constitution of the United States, or in which the constutionality of any law of the United States is drawn in question." . . .
>
> "A case may be said to involve the construction or application of the Constitution of the United States when a title, right, privilege or immunity is claimed under that instrument, but a definite issue in respect of the possession of the right must be distinctly deducible from the records before the judgment of the court below can be revised, on the ground of error in the disposal of such a claim by its decision. And it is only when the constitutionality of a law of the United States is drawn in question not incidentally, but necessarily and directly, that our jurisdiction can be invoked for that reason.
>
> "An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the court

below, and rulings asked thereon, so as to give jurisdiction to this court."

In the case of Itow v. United States, 233 U. S. 581, 34 Sup. Ct. 699, the Supreme Court of the United States dismissed for want of jurisdiction a direct appeal from Alaska. Mr. Chief Justice White delivered the opinion of the court which cited and followed the Ansbro case, ante, and said:

" . . . But in the light of the settled rule which we have stated (quoting from the Ansbro case) it is apparent on the face of the record that the assignments are wholly inadequate to give us the power to directly review, since there is nothing whatever directly or indirectly even intimating that the reliance on the Constitution was stated at the trial below in any form . . . .

"But the latter conception overlooks the conclusively settled rule to which we have referred that the power to directly review because of a Constitutional question obtains only where such question was involved in the trial court; that is, was there actually raised.

" . . . The destructive effect on the distribution of judicial power made by the Act of 1891 which would result from holding that jurisdiction to directly review obtained in any case because of a Constitutional question, irrespective of the making of such question in the trial court, merely because of the possibility, after completion of the trial below, of suggesting for the first time, such question as the foundation for resorting to direct review, is apparent and finds apt illustration in this case. Thus, although the accused made no objection, constitutional or otherwise, to the permission given by the court to the jury to separate, and indeed expressly assented to such separation,

> yet, as one of the grounds for direct review by this court it is insisted that, as the Constitution guaranteed a jury trial according to the course of the common law, and permission to separate could not be granted under that law, therefore the accused was deprived of a constitutional right. . . . ."
>
> "Dismissed for want of jurisdiction."

See also: State of Arkansas, et al. v. Schlierholz, 178 U. S. 598, 21 Sup. Ct. 229, 231; Goodrich v. Ferris, et al., 214 U. S. 71, 29 Sup. Ct. 580, 583; 25 Corpus Juris 913, section 263.

The record in the case before the court does not present any constitutional question for review, since it fails to disclose any controversy on such subject properly raised in the court below. The assignment of errors cannot be availed of to import constitutional questions into the cause which the record does not show were raised in the court below and rulings asked thereon, so as to give jurisdiction to this court on the theory that the Constitution is involved.

It appearing that the Constitution is not involved in this case, it is respectfully urged, therefore, that the motion to dismiss should be granted and the appeal dismissed for want of jurisdiction.

ARGUMENT ON THE MERITS.

Careful study of appellant's argument indicates that he relies upon the proposition that the court did not have jurisdiction to try appellant summarily, and to make the order reciting contempt and

imposing the sentence because, according to appellant, there was no contempt of court; and, if there was contempt of court, it was not direct contempt in the presence of the court but constructive contempt not in the presence of the court, which could only be tried by affidavit, and show cause or arrest to bring appellant before the court.

Appellant cannot very well rely upon any other proposition than that the court did not have jurisdiction, for the record in this case, hereinafter more particularly referred to, clearly shows that appellant made no objection, nor did he reserve any exception to any act or ruling of the court. On this point, the authors of 13 Corpus Juris (Contempt) 102, section 165, say:

> "As a general rule (in contempt cases) questions not raised in the trial court, excepting the question of the jurisdiction of the court, will not be considered by the reviewing court."

Some of the argument advanced by appellant in support of his point that there was no contempt apparently challenges the truth of facts in the order reciting contempt. But, as stated by the Supreme Court of the United States in the case of In Re Terry, 128 U. S. 289, 9 Sup. Ct. 77, 81:

> "Necessarily there can be no inquiry de novo in another court (in direct contempt) as to the truth of the fact. There is no mode provided for conducting such an inquiry. There is no prosecution, no plea, no issue upon which there can be a trial."

It is believed by appellee that the fact of whether there was direct contempt of court in the presence

of the court must be determined from the provisions of section 1443 Compiled Laws of Alaska defining the procedure in direct contempts; from the face of the record, and particularly from the order reciting contempt; and from the provisions of section 1441 (3 and 1), Compiled Laws of Alaska, defining contempts.

Section 1443, Compiled Laws of Alaska, defines the procedure in direct contempts. This statute is declaratory of the common law on the same subject (4 Bl. Comm. 286, cited in In Re Terry, 128 U. S. 289, 9 Sup. Ct. 77), and is as follows:

> "When a contempt is committed in the immediate view and presence of the court or officer, it may be punished summarily for which an order must be made reciting the facts as occurring in such immediate view and presence, determining that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed. In other cases of contempt the trial shall proceed upon testimony produced as in criminal cases, and the accused shall be entitled to be confronted with the witnesses against him, but such trial shall be by the court, or, in the discretion of the court, upon application of the accused, a trial by jury may be had as in any criminal case."

In direct contempts, either at common law, or under the provisions of section 1443, the offender may be instantly apprehended and imprisoned in the discretion of the court without any further proof or examination; without trial or issue, and without other proof than its actual knowledge of what occurred. 4 Bl. Comm. 286, cited in In Re Terry, 128 U. S. 289, 9 Sup. Ct. 77.

The order reciting the contempt (p. 40 trans.) shows on its face that appellant was summarily tried and sentenced, without jury trial, for direct contempt, committed in the presence of the court, in accordance with the provisions of section 1443, ante.

From the face of the record, which shows no objections or exceptions to any act or ruling of the court, we are to determine whether the court had jurisdiction to punish appellant summarily for direct contempt of court committed in the presence of the court.

The record in this case as viewed by appellee is the order reciting contempt (pp. 40, 51, trans.), and such other documents or instruments as have been incorporated in the order by reference, which include: the petition for writ of review (p. 51, trans.), referred to as exhibit 1 (p. 40, trans.); a letter written by appellant to the court (pp. 54, 55, trans.), referred to as exhibit 2 (pp. 40, 41, trans.); the testimony of Maxfield Dalton (pp. 55, 70, trans.), referred to as exhibit 3 (p. 43, trans.); the testimony of Mrs. William L. Paul (pp. 70-79, trans.), referred to as exhibit 4 (p. 43, trans.); the testimony of William L. Paul, appellant (pp. 79-84, trans.), referred to as exhibit 5 (p. 44, trans.); an affidavit of prejudice (pp. 84-87, trans.), referred to as exhibit 6 (p. 50, trans.); and the record of the proceeding shown in the transcript pages 1-8.

The record shows, in substance and effect, that at 2:10 P. M., February 23, 1929, (p. 2, trans.), the

district court for the First Division of Alaska, at Ketchikan, Alaska, Judge Harding on the bench, was in regular session, at which time and place appellant appeared before the court, in open court, in the immediate view and presence of the court, in behalf of a certain petition for writ of review, which he personally theretofore had made, signed, certified and filed in said court and cause, and moved to continue the hearing on the petition then before the court for the purpose of amending it by changing some of the language (p. 2, trans.); whereupon, the court requested a statement from appellant (p. 3, trans.) as to what was his basis for alleging certain matter in the petition under oath as an attorney (p. 4, trans.) which, as stated by the court, (pp. 4, 6, trans.), was known by the court to be incorrect and untrue. The court then adjourned temporarily at appellant's request to enable appellant to secure certain correspondence. At 2:45 P. M., appellant (p. 8, trans.) announced that he was ready to proceed, whereupon the testimony of Maxfield Dalton, the petitioner for the Writ of Review, was taken and he was cross examined by appellant. Appellant then voluntarily made a statement to the court in his own behalf—he was not cross examined; and he was granted permission to call, and he did call, a witness in his own behalf (p. 30, trans.). The court took the matter under advisement, and granted the appellant permission to file an amended complaint. Thereafter, on February 25, 1929, the objectionable Affidavit of Prejudice (p. 84, trans.) came before

the court. On March 4, 1929, the court in open court pronounced the Order Reciting Contempt committed by appellant on February 23, 1929, (p. 40, trans.). This delay in making the order did not affect its validity. On this point the Supreme Court in the case of In Re Terry, 128 U. S. 289, 9 Sup. Ct. 77, 82, said:

> "Jurisdiction of the person of the petitioner attached instantly upon the contempt being committed in the presence of the court. That jurisdiction was neither surrendered nor lost by delay on the part of the circuit court in exercising its power to proceed, without notice and proof, and upon its own view of what occurred, to immediate punishment."

It appears from the record that the written petition containing the alleged contemptuous matter regularly came up for hearing before Judge Harding on February 23, 1929, in open court at a regular session of the court. The appellant was before the court presenting the written petition. The fact of the objectionable language of the petition and affidavit of prejudice being in writing when presented before the court is no less in the immediate view and presence of the court than had it been spoken to the court.

In Hughes v. Peo. 5 Colo. 436, 450, an affidavit for a change of judges was presented to the court while in session by respondent's attorney, respondent, himself an attorney, being absent. Upon contempt proceedings against the affiant, the Supreme Court of Colorado, said:

> "It was in the face of the court, and warranted the judge in taking cognizance of it summarily as though the words, instead of being written, and read in court, had been spoken in facie curiae by the plaintiff in error appearing in his proper person."

The court appeared to know of his own knowledge the fact of the incorrectness and falsity of the allegations in the petition. The record does not show how the court knew these facts; but it does show that the court on February 23d, did know the incorrectness and falsity of the allegations of the petition while it was before him in open court for hearing. Apparently, as far as the record discloses, the judge became immediately cognizant of it as it was being presented before him. The court may have been familiar with the case of Ex Parte Savin, 131 U. S. 267, 9 Sup. Ct. 699, 702, wherein the Supreme Court of the United States said:

> "It is not necessary that proceedings against attorneys for malpractice, or any unprofessional conduct, should be founded upon formal allegations against them. Such proceedings are often instituted upon information developed in the progress of a cause, or from what the court learns of the conduct of an attorney from its own observation. Sometimes they are moved by third parties upon affidavit, and sometimes they are taken by the court upon its own motion. All that is requisite to their validity is that, when not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made, and opportunity afforded him for explanation and defense. The manner in which

> the proceedings shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation."

The contempt alleged in the first count of the Order Reciting Contempt is based upon section 1441, subdivision 3, Compiled Laws of Alaska, which provides:

> "The following acts or omissions in respect to a court of justice or proceedings therein are deemed to be contempts of the authority of the court: . . . Third, Misbehavior in office or other willful neglect or violation of duty by an attorney. . . ."

The first count of the order and record shows, in substance and effect, that on February 23, 1929, appellant, an attorney of the court, in open court, in the immediate view and presence of the court, upon the hearing of a matter pending before the court, to wit, the aforesaid proceeding for a Writ of Review, willfully, knowingly, purposely, intentionally and fraudulently, and in violation of his duty of being honest, fair and truthful to the court misbehaved in such office and capacity and violated his duty as such attorney by personally and in person making, signing, certifying and filing in said court in said proceeding, and by presenting the same to the court in open court, in the immediate view and presence of the court, when the same came on for hearing, a petition containing certain matters which appellant knew to be fictitious, false and untrue, and which were known to the court to be incorrect and untrue (pp. 4, 6, trans.), for the fraudulent in-

tent and purpose of deceiving the court and thereby obtaining of and from the court a process known as a Writ of Review.

The contempt alleged in the second count of the Order is based upon section 1441 also, but upon the first subdivision thereof, which provides:

> "The following acts or omissions, in respect to a court of justice or proceedings therein are deemed to be contempts of the authority of the court. First. Disorderly, contemptuous or insolent behavior toward the judge while holding the court, tending to impair its authority or to interrupt the due course of a trial or other judicial proceeding."

The second count of the order, and the record, shows in substance and effect that on February 23, 1929, said petition for Writ of Review, theretofore personally and in person, made, certified, signed and filed in said court and cause by appellant, came on for hearing in open court, in the immediate view and presence of the court while holding the court in said proceeding; that appellant moved to continue the hearing for the purpose of amending said petition by changing some of the language; that certain allegations of the petition, referring to the judge of the court, were knowingly fictitious, false and untrue and known by the court to be incorrect and untrue (pp. 4, 6, trans.) and made by appellant in contemptuous and insolent disregard for the judge of said court, and made with the intent and for the purpose of discrediting and embarrassing said judge in his official

capacity and official functions and in his administration of said court, all tending to impair the authority of the court; and that appellant filed in said proceeding for Writ of Review an affidavit of prejudice containing allegations unnecessary to obtain the relief requested, which allegations reflected upon the integrity of the judge of the court, and were knowingly false and untrue and made with the intent and purpose of further discrediting and embarrassing the judge in his official capacity as judge of said court, and in his official functions and administration of said court; and impairing the authority, honor and dignity of the court and the judge thereof.

It is respectfully contended, therefore, that the facts as shown in the record and count one of the order reciting contempt constitute contempt of court in the presence of the court as defined in section 1443, and in section 1441 (3), ante; and that the facts as shown in the record and count two of the order reciting contempt constitute contempt of court in the presence of the court as defined in section 1443, and in section 1441 (1), ante; and, therefore, the court had jurisdiction to punish appellant summarily for direct contempt of court committed in the presence of the court, without trial or issue, and without other proof than its actual knowledge of what occurred.

Appellant's brief (page 66) refers to appellant's attempt to amend the petition and apologize to the court, and states that "Mr. Paul had no intention to

insult Judge Harding in the statements in the petition or otherwise". But, contempt of court is not dependent upon intention. In the case of Hughes v. The People, 5 Colo. 436, 453, the Supreme Court of Colorado said:

> "Nor is the contempt purged by an avowal that no contempt was intended. The question of contempt does not depend on intention, although, where the contempt was intended, this is an aggravating feature, which goes to the gravamen of the offense."

Reference is also made in appellant's brief to a jury trial by virtue of chapter 22, section 2, of the Session Laws of Alaska for 1925 (pp. 20-21 brief); but, assuming that the territorial act is valid, it clearly appears that its provisions do not apply to direct contempts, but only to contempts not committed in the presence of the court.

Some argument is made (pp. 88-89 brief) by appellant to the effect that Judge Harding was disqualified in this matter. This point was before the Supreme Court of California in the case of Lambertson v. Tulare County Superior Court, 11 LRA (NS) 619, 622, where it was said:

> "Nor is the judge disqualified from sitting in the contempt proceedings. Petitioner's theory in this regard, if we understand it, is that the judge is disqualified from hearing the proceedings in contempt, because the contempt itself consists in imputations upon his motives and attacks upon his integrity. Such is not and never has been the law. The position of a judge in such a case is undoubtedly a most delicate one, but his duty is none the less plain, and

that duty commands that he shall proceed. However willing he may be to forego the private injury, the obligation is upon him by his oath to maintain the respect due to the court over which he presides."

CONCLUSION.

It is respectfully submitted, therefore, that this appeal ought to be dismissed for want of appellate jurisdiction; or the judgment of the trial court sustained on the merits.

Respectfully submitted,

HOWARD D. STABLER,
United States Attorney.

No. 5818

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

FANNIE UNDERWOOD LARSEN, Executrix of the Estate of ORVILLE LARSEN, Deceased,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Arizona.

The Filmer Bros. Electrotype Co., San Francisco—5—28—29—50

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

JOHN C. GUNG'L, Esquire, United States Attorney for the District of Arizona, Tucson, Arizona; LEMUEL P. MATHEWS, Assistant United States Attorney for the District of Arizona, Phoenix, Arizona; J. P. GROSS, Regional Attorney United States Veterans' Bureau, Phoenix, Arizona,

Attorneys for the (Defendant) Appellant.

FRED W. FICKETT, Jr., Esquire, Tucson, Arizona; WM. R. MIZBAUGH, Esquire, Tucson, Arizona;

Attorneys for the (Plaintiff) Appellee.

[1*]

In the District Court of the United States in and for the District of Arizona.

No. L.–423—TUCSON.

ORVILLE LARSEN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

*Page-number appearing at the foot of page of original certified Transcript of Record.

COMPLAINT.

Comes now the plaintiff, and for his cause of action against the defendant, alleges:

I.

That the plaintiff is a resident of the city of Tucson, within the State and District of Arizona.

II.

That on the 26th day of March, 1918, the plaintiff enlisted in the military service of the United States of America. That within one hundred twenty (120) days thereafter, upon the application of plaintiff, and while the plaintiff was still in the military service of the United States of America, there was issued to the plaintiff by the defendant, a policy of War Risk Insurance, numbered T–1,-717,643, and in consideration of the premiums paid and to be paid by the plaintiff under said policy, the defendant obligated itself to pay to the plaintiff, among other things, in the event of permanent and total disability, the sum of ten thousand ($10,000.00) dollars with interest, payable in two hundred forty (240) monthly installments of fifty-seven and 50/100 ($57.50) dollars each, commencing at the date of disability. [2]

III.

That plaintiff was honorably discharged from the military service of the United States of America on or about the 5th day of April, 1919.

IV.

That during the month of September, 1918, while the plaintiff was in the military service of the United States of America, and in line of duty of the plaintiff, and while the policy of insurance herein referred to was in full force and effect, the plaintiff was engaged in active combat in the St. Mihiel Offensive in France, during which combat plaintiff did inhale poisonous gases, and did suffer extreme physical hardships and exposure, by reason of and as the sole and direct result of which plaintiff contracted nephritis and active pulmonary tuberculosis, and that because of such nephritis and active pulmonary tuberculosis contracted as aforesaid, the plaintiff became, on or about the 5th day of April, 1919, and ever since said date has been and now is, totally and permanently disabled, and permanently incapacitated from following any active occupation or vocation in life; and unable to do anything for his support and maintenance, and said policy of insurance hereinbefore referred to was in full force and effect on and after the 5th day of April, 1919. That because of such disability caused as aforesaid, the defendant became obligated under said contract of insurance, to pay to the plaintiff the sum of ten thousand ($10,000.00) dollars, with interest, payable in two hundred forty (240) monthly installments of fifty-seven and 50/100 ($57.50) dollars each, from and after the 5th day of April, 1919.

V.

That plaintiff has paid all of the premiums on his

part [3] to be paid under said policy of insurance, and has performed all of the covenants and agreements by him to be performed under said policy of insurance, and that said policy of insurance is now, and ever since the issuance of said policy, has been in full force and effect.

VI.

That under and by virtue of the laws of the United States of America, it became, and now is the duty of the Director of the Veterans' Bureau to pay to the plaintiff under said contract and policy of insurance, the amount due thereon, to wit: ten thousand ($10,000.00) dollars, with interest, in monthly installments as aforesaid, and the defendant became and now is obligated to pay to the plaintiff the full sum of ten thousand dollars ($10,000.00), with interest, as aforesaid, yet the said defendant and the said Director of the Veterans' Bureau have hitherto refused and do now refuse to pay to said plaintiff any of the amount due on said policy and contract of insurance except the sum of four thousand four hundred and 24/100 ($4,400.24) dollars, which has been paid and is now being paid to the plaintiff by the defendant at the rate of twenty-five and 30/100 ($25.30) dollars per month. That plaintiff has made to the said Director of the Veterans' Bureau the proof required by the regulations and rules of said Veterans' Bureau to entitle plaintiff to the payment of the full amount of the aforesaid insurance. That a disagreement has arisen between

said Veterans' Bureau and the plaintiff as to the amount plaintiff is entitled to under said policy and contract of insurance, and plaintiff has demanded the payment of the full sum of ten thousand ($10,000.00) dollars, with interest, as aforesaid, but the defendant and the [4] Veterans' Bureau have refused to pay and do now refuse to pay said full sum of ten thousand ($10,000.00) dollars with interest, and has only paid and agreed to pay to the plaintiff the sum of four thousand four hundred and 24/100 ($4,400.24) dollars, as aforesaid, and there is now due and payable to the plaintiff under said contract and policy of insurance, in addition to the said four thousand four hundred and 24/100 ($4,400.24) dollars, which is now being paid in monthly installments, the sum of twenty-nine hundred twenty and 20/100 ($2920.20) dollars in cash for monthly installments past due and unpaid, also one hundred forty-nine (149) monthly installments of thirty-two and 20/100 ($32.20) dollars, beginning December, 1926.

WHEREFORE, plaintiff prays judgment against the defendant as follows:

1. That said defendant be ordered and directed to pay to the plaintiff the sum of twenty-nine hundred twenty and 20/100 ($2920.20) dollars in cash, together with interest thereon at the rate of six per cent *per annum* from the several dates when the installments became due and payable, until said sum is paid.

2. That said defendant be ordered and directed to pay to the plaintiff the sum of thirty-two and

20/100 ($32.20) dollars on the first day of each and every month hereafter until there shall have been paid one hundred forty-nine (149) additional installments to those already paid and now being paid.

3. For such other and further relief as to the Court may seem proper.

FRED W. FICKETT, Jr.,
WM. R. MISBAUGH,
Attorneys for Plaintiff. [5]

State of Arizona,
County of Pima,—ss.

Orville Larsen, being first duly sworn, on oath deposes and says: That he is the plaintiff named in the above-entitled cause; that he has read the foregoing complaint and knows the contents thereof; that the matters therein alleged are true of his own knowledge, except those matters alleged on information and belief, and as to those he believes them to be true.

ORVILLE LARSEN.

Subscribed and sworn to before me this 24th day of November, 1926.

[Seal] FRED W. FICKETT, Jr.,
Notary Public.

My commission expires June 14, 1930.

[Indorsements]: Filed Nov. 26, 1926.

Received copy of the within complaint this 26th day of November, 1926.

JOHN B. WRIGHT,
United States Attorney.
By CLARENCE V. PERRIN,
Assistant United States Attorney. [6]

[Title of Court and Cause.]

MOTION TO STRIKE.

Comes now the defendant above named and moves that this Court strike from plaintiff's complaint all those certain parts hereof, hereinafter particularly described, on the grounds that the same constitute redundant and immaterial matter, to wit:

I.

All that part of Paragraph IV of the said complaint, beginning with the words, "that because" in the eighteenth line of said Paragraph IV and continuing to the end of said paragraph.

II.

All that part of Paragraph VI of said complaint, beginning with the first words thereof, and ending with the words, "as aforesaid," in the eighth line thereof.

III.

All that part of said Paragraph VI of said complaint, beginning with the words, "that plaintiff" in the fifteenth line, and ending with the words, "aforesaid insurance" in the eighteenth line.

IV.

All that part of said Paragraph VI of said complaint, beginning with the words, "and there is now due," in the fifth line on the fourth line, and continuing to the [7] end of the paragraph.

V.

All that part of the prayer, relating to interest, and all that part of Paragraph 2 of the said prayer, relating to future installments.

JOHN B. WRIGHT,
United States Attorney.
By GEORGE R. HILL,
Asst. United States Attorney.

[Indorsements]: Filed Feb. 10, 1927. [8]

[Title of Court and Cause.]

WAIVER OF JURY AND REQUEST FOR SPECIAL FINDINGS.

Comes now the United States of America, defendant above named, and waives the right of trial by jury in the above-entitled cause, and consents that the same be tried by the Court without a jury, and respectfully requests that the Court make specifid findings on each and every issue tried before the Court.

JOHN B. WRIGHT,
United States Attorney.
By GEORGE R. HILL,
Asst. United States Attorney.

Plaintiff does hereby join in and consent to the above waiver and request.

Dated at Tucson, Arizona, this 17th day of September, 1928.

FRED W. FICKETT,
Attorney for Plaintiff.

[Indorsements]: Filed Feb. 11, 1927. [9]

November, 1926, Term—Tucson.

Honorable WILLIAM H. SAWTELLE, United States District Judge, Presiding.

(Minute Entry of Friday, April 8, 1927.)

[Title of Court and Cause.]

MINUTES OF COURT — APRIL 8, 1927 — ORDER OVERRULING MOTION TO STRIKE.

The defendant's motion to strike having been heretofore argued and submitted and the Court having duly considered the same, does now

ORDER that all grounds of said motion be and they are hereby overruled, except such grounds thereof as apply to the claim of interest and future monthly payments. Upon those matters the Court reserves its ruling until the trial of the cause. Exceptions noted on behalf of the defendant. The defendant is allowed ten days to answer. [10]

[Title of Court and Cause.]

FIRST AMENDED ANSWER.

Comes now the United States of America, defendant above named and files this its first amended answer and alleges and denies as follows, to wit:

I.

Defendant alleges that the plaintiff allowed his insurance to lapse for nonpayment of the premium due May 1, 1919, and thereafter on October 21, 1921, the plaintiff applied for a reinstatement of two thousand and no/100 ($2,000.00) dollars of said insurance, and upon plaintiff's representation that he was not then totally and permanently disabled, the said policy was reinstated in the sum of two thousand and no/100 ($2,000.00) dollars, and that thereafter on October 1, 1922, the plaintiff converted his said two thousand and no/100 ($2,000.00) dollar term insurance into a twenty payment life policy, and paid premiums thereon until January, 1924. On November 5, 1923, plaintiff again applied for reinstatement of his said lapsed eight thousand and no/100 ($8,000.00) dollar term insurance, which application was rejected for the reason that at that time plaintiff was totally and permanently disabled, and that plaintiff had failed to appeal from the order denying such reinstatement, and failed to cause the same to be reviewed, and that by reason thereof, he is now barred and estopped from claiming that such insurance was in effect. [11]

II.

And answering further defendant alleges that upon plaintiff's application for reinstatement of the said two thousand and no/100 ($2,000.00) dollars he furnished to the director satisfactory proof showing that he was not then and there totally and permanently disabled, whereupon the director decided that the plaintiff was not totally and permanently disabled, and was entitled to reinstatement, and that such decision of the director was and is final and conclusive, and the plaintiff is barred and estopped from asserting or claiming that he was totally and permanently disabled prior to plaintiff's application for reinstatement.

III.

Defendant further alleges that plaintiff is barred and estopped from maintaining this action on the two thousand and no/100 ($2,000.00) dollar life insurance policy, which is in effect for the reason that the said policy was a new contract which supplemented the term insurance, and took its place, and constituted a novation. It was and is a policy independent from the ten thousand and no/100 ($10,000.00) dollar term insurance and that it is not pleaded herein.

IV.

And answering further, the defendant alleges that the plaintiff was awarded thirteen and 80/100 ($13.80) dollars monthly on two thousand five hundred and no/100 ($2,500.00) dollars insurance, a part of the lapsed eight thousand and no/100

($8,000.00) dollars insurance, which was held to be in force by virtue of compensation remaining uncollected at the time of permanent and total disability under Section 305 of the World War Veterans' Act, as amended, all of which has been known to plaintiff, and the plaintiff has never appealed or attempted to review the order allowing him the two thousand five hundred and no/100 ($2,500.00) dollars [12] extended insurance, but has accepted the same, and is now barred and estopped from claiming that the said order and allowance for said insurance was erroneously made.

V.

The defendant further alleges that plaintiff's said disability is alleged to have accrued on or about the 5th day of April, 1919, and that this action was not filed until about the 24th day of November, 1926; that plaintiff's contract of insurance was in writing, and that it was not made or executed in the State of Arizona, and that plaintiff's cause of action thereon is barred by the provisions of Sections 713 and 716 of the Revised Statutes of the State of Arizona.

WHEREFORE, defendant prays that plaintiff's cause of action be dismissed.

JOHN B. WRIGHT,
United States Attorney.
By GEORGE R. HILL,
Asst. United States Attorney.

[Indorsements]: Received copy of the within this 17th day of October, 1927.

FRED W. FICKETT, Jr.,
Attorneys for Plaintiff.

Filed Oct. 17, 1927. [13]

[Title of Court and Cause.]

SECOND AMENDED ANSWER.

Comes now the United States of America, defendant above named and files this its second amended answer and alleges and denies as follows, to wit:

I.

Defendant alleges that the plaintiff allowed his insurance to lapse for nonpayment of the premium due May 1, 1919, and thereafter on October 21, 1921, the plaintiff applied for a reinstatement of two thousand and no/100 ($2,000.00) dollars of said insurance, and upon plaintiff's representation that he was not then totally and permanently disabled, the said policy was reinstated in the sum of two thousand and no/100 ($2,000.00) dollars, and that thereafter on October 1, 1922, the plaintiff converted his said two thousand and no/100 ($2,000.00) dollars term insurance into a twenty payment life policy, and paid premiums thereon until January, 1924. On November 5, 1923, plaintiff again applied for reinstatement of his said lapsed eight thousand and no/100 ($8,000.00) dollar term insurance, which application was rejected for the reason that at that time plaintiff was totally and permanently

disabled, and that plaintiff had failed to appeal from the order denying such reinstatement, and failed to cause the same to be reviewed, and that by reason thereof, he is now barred and estopped from claiming that such insurance was in effect. [14]

II.

And answering further defendant alleges that upon plaintiff's application for reinstatement of the said two thousand and no/100 ($2,000.00) dollars he furnished to the director satisfactory proof showing that he was not then and there totally and permanently disabled, whereupon the director decided that the plaintiff was not totally and permanently disabled, and was entitled to reinstatement, and that such decision of the director was and is final and conclusive, and the plaintiff is barred and estopped from asserting or claiming that he was totally and permanently disabled prior to plaintiff's application for reinstatement.

III.

Defendant further alleges that plaintiff is barred and estopped from maintaining this action on the two thousand and no/100 ($2,000.00) dollar life insurance policy, which is in effect for the reason that the said policy was a new contract which supplemented the term insurance, and took its place and constituted a novation. It was and is a policy independent from the ten thousand and no/100 ($10,000.00) dollar term insurance and that it is not pleaded herein.

IV.

And answering further, the defendant alleges

that the plaintiff was awarded thirteen and 80/100 ($13.80) dollars monthly on two thousand five hundred and no/100 ($2,500.00) dollars insurance, a part of the lapsed eight thousand and no/100 ($8,000.00) dollars insurance, which was held to be in force by virtue of compensation remaining uncollected at the time of permanent and total disability under Section 305 of the World War Veterans' Act, as amended, all of which has been known to plaintiff, and the plaintiff has never appealed or attempted to review the order allowing him the two thousand five hundred and no/100 ($2,500.00) dollars, [15] extended insurance, but has accepted the same, and is now barred and estopped from claiming that the said order and allowance for said insurance was erroneously made.

V.

The defendant further alleges that plaintiff's said disability is alleged to have accrued on or about the 5th day of April, 1919, and that this action was not filed until about the 24th day of November, 1926; that plaintiff's contract of insurance was in writing, and that it was not made or executed in the State of Arizona, and that plaintiff's cause of action thereon is barred by the provisions of Sections 713 and 716 of the Revised Statutes of the State of Arizona.

VI.

And answering further defendant denies each and every allegation in plaintiff's complaint, not hereinabove specifically admitted.

WHEREFORE, defendant prays that plaintiff's cause of action be dismissed.

JOHN B. WRIGHT,
United States Attorney.
By GEORGE R. HILL,
Asst. United States Attorney.

[Indorsements]: Received copy of the within "second amended answer" this 29th day of October, A. D. 1927.

WM. R. MISBAUGH,
FRED W. FICKETT, Jr.,
Attorneys for Plaintiff.

Filed Nov. 9, 1927. [16]

[Title of Court and Cause.]

DEMURRER TO SECOND AMENDED ANSWER.

Comes now the above-named plaintiff and demurs specially and separately to Paragraphs II, III, IV and V, and all of Paragraph II after the words 'and thereafter' in the third line of said Paragraph II, all in defendant's second amended answer, on the ground that in each of said paragraphs defendant attempts to set up an independent defense to plaintiff's complaint, and that each one of said paragraphs of said second amended answer of the defendant, does not state facts sufficient to constitute a defense to plaintiff's complaint, and for that reason is insufficient.

WHEREFORE, plaintiff prays the Court to enter its order and decree that each one of the above named paragraphs in defendant's second amended answer, considered separately and independently, is insufficient to constitute a defense to plaintiff's complaint, and that the defendant take nothing by said defenses.

In support of this demurrer plaintiff cites the memorandums of authorities filed and cited in the Hickman case, L.-440—Tucson.

FRED W. FICKETT, Jr.,
WM. R. MISBAUGH,
Attorneys for Plaintiff.

Copy received this 21st day of November, 1927.
CLARENCE V. PERRIN,
Asst. U. S. Atty.

[Indorsements]: Filed Nov. 21, 1927. [17]

May, 1928, Term—Tuscon.

Honorable WILLIAM H. SAWTELLE, United States District Judge, Presiding.

(Minute Entry of Monday, September 17, 1928.)

[Title of Court and Cause.]

MINUTES OF COURT—SEPTEMBER 17, 1928 —ORDER OVERRULING DEMURRER.

Plaintiff's demurrer to second amended answer comes on regularly for hearing this date; F. W.

Fickett, Esquire, and W. R. Mizbaugh, Esquire, appear as counsel for the plaintiff; B. E. Marks, Esquire, Assistant United States Attorney, appears as counsel for the United States, and on his motion, L. A. Lawler, Esquire, and J. P. Grosse, Esquire, counsel for the Veterans' Bureau, are entered and appear as associate counsel for the Government.

WHEREUPON, the defendant withdraws the defense of statute of limitations as alleged in Paragraph V of the answer, and it is thereupon ORDERED that said demurrer be and it is overruled. [18]

[Title of Court and Cause.]

STIPULATION RE SUBSTITUTION OF PLAINTIFF.

Orville Larsen, the plaintiff in the above-entitled cause, having died on or about the 29th day of March, 1928, and his wife, Fannie Underwood Larsen, having been appointed executrix of the estate of Orville Larsen, deceased, by the Superior Court Court of the State of Arizona, in and for the county of Pima, on the 22d day of May, 1928. IT IS HEREBY STIPULATED that the said Fannie Underwood Larsen, executrix of the estate of

Orville Larsen, deceased, be substit*uted* as plaintiff in said above-entitled action.

JOHN B. WRIGHT,
U. S. Attorney.
By B. E. MARKS,
Assistant.
FRED. W. FICKETT,
WM. R. MISBAUGH,
Attorneys for Plaintiff.

[Indorsements]: Filed Sep. 25, 1928. [19]

May, 1928, Term—Tucson.

Honorable WILLIAM H. SAWTELLE, United States District Judge, Presiding.

(Minute Entry of Tuesday, September 25, 1928.)

[Title of Court and Cause.]

MINUTES OF COURT—SEPTEMBER 25, 1928 —ORDER ALLOWING SUBSTITUTION OF PLAINTIFF.

Upon reading the stipulation filed by the attorneys for the respective parties hereto,

IT IS HEREBY ORDERED that Fannie Underwood Larsen, executrix of the estate of Orville Larsen, deceased, be and she is hereby substituted as plaintiff in the above-entitled action. [20]

[Title of Court and Cause.]

DEFENDANTS' SECOND AMENDED ANSWER.

Comes now the United States of America, defendants above named and file this their second amended answer to plaintiff's amended complaint and allege and deny as follows:

I.

Defendants allege that Orville Larsen, the decedent above named allowed his war risk insurance to lapse for the nonpayment of the premium due May 1, 1919, and thereafter on October 21, 1921 applied for reinstatement of two thousand and no/100 ($2,000.00) dollars of said insurance, representing in such application for reinstatement that he was not then totally and permanently disabled, and the defendants relying upon such representation and under the assumption that plaintiff was not totally and permanently disabled, reinstated two thousand and no/100 ($2,000.00) dollars of insurance of decedent's lapsed ten thousand and no/100 ($10,000.00) dollars term insurance and thereafter accepted from the decedent the monthly premiums becoming due under the terms of said reinstated two thousand and no/100 ($2,000.00) dollars insurance until October 1, 1922. And that by reason of such reinstated insurance, plaintiff was from October 21, 1921, until October 1, 1922, indemnified and protected against permanent and total disability or death occurring between said dates by virtue [21]

of said two thousand and no/100 ($2,000.00) dollars reinstated term insurance. That by reason of such representations made by the decedent and by reason of the actions taken thereunder by the United States Veterans' Bureau as the agent of defendants herein, both in issuing and protecting plaintiff by insurance against permanent and total disability or death occurring after October 21, 1921, plaintiff is barred and estopped from asserting or claiming that decedent was permanently and totally disabled prior to October 21, 1921.

II.

And answering further, defendants allege that on October 1, 1922, decedent applied for a conversion of said two thousand and no/100 ($2,000.00) dollars reinstated term insurance to a twenty payment life policy representing in connection with the said application for conversion of said insurance that he was not then permanently and totally disabled, and the United States Veterans' Bureau relying upon such representation and under the assumption that plaintiff was not then permanently and totally disabled converted his said two thousand and no/100 ($2,000.00) dollars term insurance to twenty payment life policy, issued a policy thereon, accepted payment of premiums from the decedent, indemnified him against permanent and total disability or death occurring from and after October 1, 1922, and paid plaintiff the monthly benefits becoming due under said policy of insurance under a finding that decedent become totally and permanently disabled October 31, 1923, which said benefits decedent

accepted until his death on March 29, 1928; that by reason of such representation relied and acted upon by both the decedent and the United States Veterans' Bureau, plaintiff is now barred and [22] estopped from asserting that decedent was permanently and totally disabled at any time prior to October 1, 1922.

III.

And answering further defendants allege that upon decedent's application for reinstatement and conversion of insurance as aforesaid, and in connection therewith, decedent was required and did submit proof to the director of the United States Veterans' Bureau, showing that he was not permanently and totally disabled as required by Section 408 of the War Risk Insurance Act, whereupon the director of the United States Veterans' Bureau, after considering such evidence as submitted by the decedent, decided that decedent was not permanently and totally disabled and was entitled to reinstate his insurance, and that such decision of the director was and is final and conclusive and is *res adjudicata* both as to the decedent and those claiming through or under him.

IV.

And answering further defendants allege that the two thousand and no/100 ($2,000.00) dollars reinstated insurance issued upon the decedent's application dated October 21, 1921, was a new contract which superseded the ten thousand and no/100 ($10,000.00) dollars term insurance contract and took its place and constituted a novation, and that there-

after any and all rights which decedent may have had under his former contract of ten thousand and no/100 ($10,000.00) dollars contract of insurance were merged in his two thousand and no/100 ($2,000.00) dollars contract of reinstated term insurance.

V.

And answering further defendants allege that the two thousand and no/100 ($2,000.00) dollars twenty payment [23] life policy issued upon the decedent's application dated October 1, 1922, for conversion of his two thousand and no/100 ($2,000.00) dollars reinstated term policy was a new contract and took the place of the two thousand and no/100 ($2,000.00) dollars reinstated contract of insurance and constituted a novation, and said former two thousand and no/100 ($2,000.00) dollars reinstated term insurance became null and void.

VI.

Answering further said complaint, defendants admit the allegations in Paragraph I, II, and III thereof.

VII.

Defendants deny each and every allegation in Paragraphs IV and V of said complaint as though said allegations were here specifically repeated.

VIII.

Defendants deny each and every allegation in Paragraph VI contained except that it is admitted that a disagreement existed between the decedent and the United States Veterans' Bureau as alleged

in said Paragraph VI and it is further admitted that the United States Veterans' Bureau has paid the monthly benefits on decedent's two thousand and no/100 ($2,000.00) dollars converted insurance from October 31, 1923, and has also paid the monthly installments accruing from October 31, 1923, until January, 1927, on two thousand four hundred and 32/100 ($2,400.32) dollars insurance which was erroneously deemed to be in force under the provisions of Section 305 of the World War Veterans' Act.

IX.

Defendants deny each and every allegation of plaintiff's complaint not hereinabove specifically admitted. [24]

WHEREFORE, defendants pray that plaintiff take nothing by her action, and for costs.

JOHN B. WRIGHT,
United States Attorney.
By B. E. MARKS,
Asst. United States Attorney.

[Indorsements]: Received copy of the within this 27th day of September, A. D. 1928.

WM. R. MISBAUGH,
FRED W. FICKETT,
Attorneys for Plaintiff.

Filed Sep. 27, 1928. [25]

[Title of Court and Cause.]

THIRD AMENDED ANSWER, COUNTERCLAIM AND OFFSET.

Come now the United States of America, defendants in the above-entitled cause, by their United States Attorneys, and file this, their third amended answer, counterclaim and offset to plaintiff's complaint, and alleges and denies, as follows, to wit:

I.

The defendants admit that they granted to Orville Larsen, a contract of war risk term insurance in the principal sum of ten thousand dollars, payable as prescribed by its terms to the designated beneficiary thereof in the event the said Orville Larsen died while said contract was in force and effect and payable to him in installments of fifty-seven and 50/100 dollars per month in the event he became permanently and totally disabled while said contract was in force, so long as he remained so disabled.

II.

The allegations contained in Paragraphs I and II of the plaintiff's complaint are denied, except as hereinabove admitted.

III.

The allegations contained in Paragraph III of the plaintiff's complaint are admitted.

IV.

The allegations contained in the fourth and fifth

Paragraphs of the plaintiff's complaint are denied. [26]

V.

Answering paragraph VI of plaintiff's complaint it is denied that under and by virtue of the laws of the United States of America, it became, and now is the duty of the director of the Veterans' Bureau to pay to the plaintiff under said contract and policy of insurance, the amount due thereon, to wit: Ten thousand dollars, with interest, in monthly installments as aforesaid, and the defendants became and now are obligated to pay to the plaintiff the full sum of ten thousand dollars, with interest, as aforesaid.

Further answering said Paragraph VI it is admitted that the defendants and the director of the United States Veterans' Bureau have refused and do now refuse to pay plaintiff any amounts provided for or any proceeds of the said ten thousand dollars war risk term insurance contract granted the said Orville Larsen by defendants.

Further answering said paragraph it is denied that the defendants have paid plaintiff or the said Orville Larsen the sum of four thousand four hundred and 24/100 dollars, by reason of or as proceeds of said ten thousand dollar War Risk Term Insurance contract granted the said Orville Larsen and denies that said sum has been paid or is now being paid to the plaintiff by the defendants at the rate of twenty-five and 30/100 dollars per month, or otherwise.

Further answering said paragraph it is admitted

that a disagreement has arisen between the United States Veterans' Bureau and the plaintiff as to the amount the plaintiff is entitled to under said war risk term insurance contract and that plaintiff has demanded the payment of the full sum of ten thousand dollars, with interest. The defendants and the United States Veterans' Bureau have refused to pay and do now refuse to pay the full sum of ten thousand dollars to the plaintiff. The remaining allegations in said paragraph contained are denied. [27]

VI.

Further answering plaintiff's complaint and as an affirmative defense, defendants aver and allege that on or about the first day of October, A. D. 1922, the said Orville Larsen surrendered and abandoned any and all rights he had under and by virtue of the said ten thousand dollars war risk term insurance contract and converted the same into a twenty payment Government life insurance policy for the principal sum of two thousand dollars, on which said policy the plaintiff paid certain premiums and under which he received protection and which said policy was and has been by the defendants matured in favor of the beneficiary thereof and the proceeds thereof have been and are now being paid to and received by the beneficiary thereof; that by reason of the conversion of said War Risk Term Insurance contract to said Government live insurance policy a new contract was thereby made by the defendants and plaintiff and was entered into by the defendants and the said Orville Larsen,

which took the place of the said war risk term insurance contract and constituted a novation of and for the former contract of insurance between the defendants and the said Orville Larsen and that said term insurance contract thereby ceased to be in force and of effect.

Defendants further aver and allege that the said Orville Larsen was not entitled to have his said term insurance contract converted into a Government life insurance policy if he was at the time same was converted permanently and totally disabled and further alleges that to be entitled to convert said term insurance contract into a Government life insurance policy it was incumbent upon the said Orville Larsen to furnish proof satisfactory to the director of the United States Veterans' Bureau that he was not permanently and totally disabled and that the said Orville Larsen did furnish proof satisfactory to the director of the United States Veterans' Bureau that he was not permanently and totally disabled and his said contract of war risk term insurance was therefore and thereby converted into a said Government life insurance policy, and further, defendants aver and allege that by reason of the conversion of the said [28] term insurance contract to said Government life insurance policy, as aforesaid, the plaintiff, as executrix of the said Orville Larsen is barred and estopped from maintaining this action of said term insurance contract or from receiving any benefits thereunder.

VII.

Further answering plaintiff's complaint and by way of offset thereto in the event any judgment is obtained by the plaintiff in the above-entitled cause, defendants aver and allege that they have paid the said Orville Larsen and the plaintiff the sum of two thousand dollars and that defendants are entitled to have said amount set off against any judgment had by the plaintiff herein.

VIII.

Further answering plaintiff's complaint and by way of offset in the event plaintiff obtains any judgment in the above-entitled cause, defendants allege and aver that they paid the said Orville Larsen, during his lifetime, the sum of seven hundred seventy-two and 80/100 dollars which payment was erroneous and unlawful and the said Orville Larsen was not entitled thereto in law; that said sum was due the defendants from the said Orville Larsen during his lifetime and was never paid and is now due the defendants from the estate of the said Orville Larsen and that, therefore, the defendants are entitled to have said amount offset against any amount recovered by the plaintiff herein.

IX.

Further answering the plaintiff's complaint, the defendants allege and aver that they paid the said Orville Larson, during his lifetime, the sum of seven hundred seventy-two and 80/100 dollars, which was paid to said Orville Larsen erroneously and without authority of law and the said Orville

Larsen was not entitled thereto; that said sum was due defendants from the said Orville Larsen, during his lifetime, but that same was never paid and that said sum is now due the defendants from the plaintiff herein as executrix of said Orville Larsen and therefore defendants are entitled to a judgment [29] of and against the plaintiff herein for said amount.

WHEREFORE defendants pray that plaintiff's cause of action be dismissed and that they have judgment against the plaintiff for the sum seven hundred seventy-two and 80/100 dollars, and for costs.

JOHN B. WRIGHT,
United States Attorney.
By B. E. MARKS,
Asst. United States Attorney.

[Indorsements]: Service of copy acknowledged 12/3/28.

WM. R. MISBAUGH,
Of Counsel for Plaintiff.

Filed Dec. 5, 1928. [30]

[Title of Court and Cause.]

ORDER EXTENDING TERM SIXTY DAYS TO SETTLE BILL OF EXCEPTIONS, ETC.

The United States of America, defendant in the

above-entitled case desiring to have a bill of exceptions settled for the purpose of a writ of error.

Now, on motion of B. E. Marks, Assistant U. S. Attorney for the said United States of America, Defendant,

IT IS ORDERED, That the present term and the jurisdiction of the Court over the above-entitled cause, for the purpose of presenting and having settled a bill of exceptions, be and the same is hereby extended for a period of sixty days from the end of the present term; provided, however, that the proposed bill of exceptions shall be prepared and served by the party proposing the same upon the opposite party, and any proposed amendments and alterations thereof served by such opposite party, and the same submitted to the presiding Judge for settlement, within the times and in the manner provided by Rule 76 of the rules of this Court.

Dated at Tucson, Arizona, this 12th day of December, 1928.

JEREMIAH NETERER,
District Judge.

[Indorsement]: Filed Dec. 12, 1928. [31]

in the Veterans' Bureau shows chronic parenchymatous nephritis and was rated by the Bureau as temporary, total disability as of Nov. 3, 1919. April 30, 1920, diagnosis shows temperature 101, [33] extreme pain in right chest, "whole right chest is dull. X-ray of chest shows entire right lung cloudy." May 5, 1920, diagnosis temperature 101, extreme pain in right chest. Oct. 14, 1920, he was rated by the War Risk Insurance Division, "The degree of vocational handicap is major." Sept. 15, 1921, was rated as temporary, total disability from Jan. 8, 1921. April 4, 1922, reported by medical director of Olive View Sanitorium as not feasible for vocational training. July 24, 1922, report diagnosis tuberculosis, pulmonary, chronic—"apparently arrested." Aug. 12, 1922, diagnosis tuberculosis, pulmonary, chronic, not able to resume prewar occupation. April 6, 1923, rated temporary, total from Aug. 12, 1922. Oct. 30, 1923, rated permanent and total from Aug. 31, 1923, and total, permanent, disability rating continued until his death.

5th. $2,000 of the policy was reinstated on his application of Oct. 24, 1921, in which he stated, "I have continuously had a rating temporary, total disability since Nov. 3, 1919, and therefore a patient at the United States Hospital, No. 51, Tucson, Ariz." Jan. 24, 1922, he stated, "I have been advised to reinstate insurance in the amount of $2,000 at this time. It is my intention to reinstate the policy of $8,000 at a later date." Oct. 1, 1922, he applied for conversion of the $2,000, reinstated, term policy into twenty payment life policy, and

premiums were paid until death. Upon death the amount of $2,000 was paid to the beneficiary. Defendant paid the monthly installments accruing upon the converted insurance from Oct. 31, 1923, until January, 1927.

Larsen was unable to do any work, and the evidence is clear and convincing that his impairment was total at the date of his discharge and that it presented a condition of mind and/or body which rendered it reasonably certain that his disability would continue to be total throughout the remainder of his lifetime, and that his impairment rendered it impossible for him to engage in any employment that would bring him continuous, gainful results, something dependable for earning a livelihood.

From the facts stated the plaintiff is entitled to recover all of the due payments of the policy, and the other payments [34] in accordance with the provisions of the policy, that credit should be given to the defendant for the amounts paid either to the deceased in his lifetime or his representative since death. The surrender of the policy and changing the form of $2,000 of the policy by reinstating and then converting it into a term policy does not estop the plaintiff in this action.

Wm. R. Misbaugh and F. W. Fickett, both of Tucson, Arizona, counsel for plaintiff.

John B. Wright, United States Attorney, Tucson, Arizona, and B. E. Marks, Assistant United States Attorney, Phoenix, Arizona, J. P. Grose, Regional Attorney, Veterans' Bureau, B. L. Guffy and L. B.

Dunn, Special Counsel for Veterans' Bureau, all of Phoenix, Arizona, counsel for defendant.

NETERER, District Judge.—There can be no doubt as to the fact that the deceased was totally and permanently disabled on the date of his discharge. This condition matured the policy, and he became entitled to the payment of $240 monthly *in* installments of $57.50 each from the date of discharge.

Is the plaintiff estopped by the assertion of the equitable defense by the application of the deceased for reinstatement of $2,000 of the policy and conversion thereof into term insurance, surrendering the $10,000 policy and receiving the reissued policy, and accepting monthly payments under the provisions of the new policy from the date disclosed in the record? Was the whole $10,000 policy satisfied by the acceptance of the new $2,000 policy? This burden is on the defendant to establish by a fair preponderance of the evidence, and this has not been done.

The condition of the deceased was known to the Veterans' Bureau. He was in United States hospitals. All medical diagnoses were in its possession, and all show the deceased's physical condition and that he was not fit for vocational training or for any service; and none show improvement except that of July 24, 1922, which says tuberculosis, pulmonary, chronic, "apparently arrested," but in less than three weeks thereafter deceased was rated *temporary total* disabled. The defendant upon the record must have known deceased's condi-

tion. The fact deceased did not know his condition and relied upon the Bureau in his application. [35] for reinstatement and conversion cannot change the plaintiff's status. The defendant on permanent, total disability was bound to pay by the terms of the policy, the legal obligation having matured. The liability became fixed in the full amount, and acceptance of a part of the due payment, even though it may have been through a reissued policy in lieu of the old, does not change the status nor bar plaintiff's claim to the balance. There was no benefit of right accruing to the plaintiff or damage to the defendant. Brooks vs. White, 2 Met. (Mass.) 283. The defendant lost nothing, Struck vs. Slicer, 97 S. E. 455 (Ga.); Border & Co. vs. Vinegar Co., 62 S. 245 (Ala.); La Moure vs. Cuyune-Mille Lacs Iron Co., 180 N. W. 540 (Minn.); and the plaintiff gained nothing. (See, also, United States vs. Skinner & Eddy Corp., 28 F. (2d) 373, 381.) The defendant paid only a part of what was due to plaintiff. The plaintiff did not know his legal status and right, and I think upon the record the court must find relied upon the Bureau. There is no suggestion in the record that deceased was consciously unfairly dealt with by the Bureau or overreached. On the contrary it shows that deceased was given much consideration. The Bureau has its problems and must administer its trust guardedly and conscientiously. It cannot nor may the Court distribute largess. The fact is, however, deceased had due $10,000, and the defendant seeks to satisfy it by the payment of $2,000, and in this the plaintiff would

be greatly wronged. This Court, in United States vs. Skinner & Eddy, supra, at 382, said: "Blackstone has said 'There is no wrong without a remedy.' Law or equity must remedy a wrong unfolded before it. Wrong, in truth, sometimes appears in the habiliments of right. The law blossoms upon the soil of wrong; but, if the law is barren, the virtue of equity must unfold into the fruitage of right. This asserted wrong may be within the garb of right, 'so stated in the bond,' but it does not disclose the true intent, and equity must unfold and fix the true status, and place the agreement within the intent and spirit of the parties. * * * * The Court should look beyond the strick letter of the correspondence to the intent, in view of the unconscionable result." In the instant case the law is potent. All payments that were made were due to Larsen or his legal representative, and defendant was [36] bound to make them. There was no consideration for the new policy. Fire Ins. Co. vs. Wickham, 141 U. S. 564.

The answer seeks enforcement of the reissued $2,000 converted policy instead of the $10,000, and to prevail the defendant must clearly show that the issuance is free from mistake or illegality, perfectly fair, equal and just, not only in its terms but in the circumstances, Nevada Nickel Syndicate vs. National Nickel Co. (C. C.) 96 F. 135, at page 145; and where it is "unconscientious or unreasonable," Cathcart vs. Robinson, 5 Pet. (30 U. S.) 264; or the disproportion so great as to shock the conscience, Marks vs. Gates, 154 F. 481; or where the

disparity is gross, equity will not enforce relief, Pasco F. L. Co. vs. Timmermann, 88 Wash. 112, 152 P. 675. All of the disclosed circumstances show that this claim, as said by the Supreme Court in Piatt's Admr. vs. United States, 89 U. S. (22 Wall.) 496, * * * * is utterly destitute of merit and repugnant to the plainest dictates of both law and justice."

Judgment will be awarded in favor of the plaintiff for the amount due on the policy less the payments which have been received, and the remainder to be paid in accordance with the provisions of the policy. The premiums paid by the deceased must be held to have been voluntary payments and may not be recovered.

JEREMIAH NETERER,
U. S. Dist. Judge.

[Indorsements]: Filed Dec. 14, 1928. [37]

In the District Court of the United States for the District of Arizona.

November, 1928, Term—Tucson.

Honorable JEREMIAH NETERER, United States District Judge, for the Western District of Washington, Specially Assigned, Presiding.

(Minute Entry of Friday, December 14, 1928.)
L.–423.

FANNIE UNDERWOOD LAWSEN, Executrix of the Estate of Orville Larsen, Deceased,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

MINUTES OF COURT—DECEMBER 14, 1928—JUDGMENT.

The above-entitled cause came on to be heard before the above-entitled Court, sitting without a jury, on the 11th day of December, 1928, the plaintiff appearing by her attorneys, Fred W. Fickett and Wm. R. Misbaugh, and the defendant appearing by its attorneys, B. L. Guffy, B. A. Marks, J. P. Cross and L. B. Dunn. A written waiver of jury having been filed herein, by both parties, evidence, both oral and documentary, was introduced by both the plaintiff and the defendant, and upon

the close of the evidence the cause was submitted to the Court by the plaintiff without argument, and the cause having been argued by the defendant, and the Court, after considering the evidence and argument of counsel, and being fully advised in the premises, did find that the plaintiff was on April 5th, 1919, totally and permanently disabled and the term insurance policy issued to Orville Larsen matured and became payable to the said Orville Larsen from the defendant under the terms of said policy in the amount of fifty-seven and 50/100 dollars ($57.50) per month from May 1st, 1919, down to December 11th, 1928, being a total sum of sixty-six hundred twelve and 50/100 dollars ($6,612.50), against which sum the defendant was and is entitled to credit in the sum of two thousand seven hundred seventy-two and 80/100 ($2,772.80) dollars, for payments made to Orville Larsen during his lifetime and to the plaintiff, and the Court did order that judgment be entered for the plaintiff in accordance with said findings. [38]

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff do have and recover of and from the defendant the sum of three thousand eight hundred fifty-nine and 70/100 dollars ($3859.70), and that out of said sum the defendant shall pay to Fred W. Fickett and Wm. R. Misbaugh, attorneys for the plaintiff, the sum of three hundred eighty-five and 97/100 dollars ($385.97) for their attorneys' fees in this action.

Done in open court this 14th day of December, 1928.

JEREMIAH NETERER,
Judge.

[Indorsements]: Filed Dec. 14, 1928. [39]

In the District Court of the United States for the District of Arizona.

November, 1928, Term—Tucson.

(Minute Entry of Monday, February 18, 1929.)

The following order, heretofore made by the Honorable JEREMIAH NETERER, United States District Judge for the Western District of Washington, at Seattle, in the State of Washington, is now entered upon the minutes and records of this court, as follows, to wit:

L.-423.

FANNIE UNDERWOOD LARSEN, Executrix of the Estate of Orville Larsen, Deceased,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

MINUTES OF COURT—FEBRUARY 18, 1929—FIRST AMENDED JUDGMENT.

The above-entitled cause came on to be heard before the above-entitled court, sitting without a jury,

on the 11th day of December, 1928, the plaintiff appearing by her attorneys, Fred W. Fickett and Wm. R. Misbaugh, and the defendant appearing by its attorneys, B. L. Guffy, B. E. Marks, J. P. Gross and L. B. Dunn. A written waiver of jury having been filed herein by both parties, evidence, both oral and documentary was introduced by both the plaintiff and the defendant, and upon the close of the evidence, the cause was submitted to the Court by the plaintiff without argument, and the cause having been argued by the defendant, and the Court, after considering the evidence and argument of counsel, and being fully advised in the premises, did find that the plaintiff was on April 5th, 1919, totally and permanently disabled and the term insurance policy issued to Orville Larsen matured and became payable to the said Orville Larsen from the defendant under the terms of said policy in the amount of fifty-seven and 50/100 dollars ($57.50) per month from May 1st, 1919, down to March 29th, 1928, being a total sum of sixty-one hundred fifty-two and 50/100 dollars ($6,152.50), against which sum the defendant was and is entitled to credit in the sum of two thousand eight hundred fourteen and 70/100 ($2,814.70) dollars, for payments made to Orville Larsen during his lifetime and to the plaintiff, and the Court did order that judgment be entered [40] for the plaintiff in accordance with said findings.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff do have and recover of and from the defendant the sum of three

thousand three hundred thirty-seven and 80/100 dollars ($3,337.80), and that out of said sum the defendant shall pay to Fred W. Fickett and Wm. R. Misbaugh, attorneys for the plaintiff, the sum of three hundred thirty-three and 78/100 dollars ($333.78) for their attorneys' fees in this action.

Done in open court this 14 day of February, 1929. As of the 14th day of December, 1928.

JEREMIAH NETERER,
Judge.

[Indorsements]: Filed Feb. 18, 1929. [41]

[Title of Court and Cause.]

MOTION FOR A NEW TRIAL.

Comes now the defendants above named and moves the Court to set aside the judgment and decision of the Court in the above-entitled cause and to grant the defendants a new trial of said cause on the following grounds, to wit:

1. That the evidence is insufficient to justify the verdict and the judgment of the Court thereof.

2. That the decision and judgment of the Court is against the law and the evidence in the case.

WHEREFORE, defendants pray for an order in this behalf.

JOHN B. WRIGHT,
United States Attorney,
By B. E. MARKS,
Assistant United States Attorney.

[Indorsements]: Received copy of the within this 22 day of January, 1929.

FRED W. FICKETT,
WM. R. MISBAUGH,
Attorneys for Plaintiff.

Filed Jan. 22, 1929. [42]

[Title of Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL.

Motion for a new trial having been duly considered, it is ORDERED AND ADJUDGED that the same be and is hereby denied, to which ruling of the Court the defendant excepts, and the exception is noted.

JEREMIAH NETERER,
U. S. District Judge.

[Indorsements]: Filed Feb. 7, 1929. [43]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To Judge and Clerk of the Above-entitled Court and to Attorneys for Plaintiff, Messrs. William R. Misbaugh and Fred W. Fickett:

You will hereby take notice that the defendants in the above-entitled cause hereby appeals to the United States Circuit Court of Appeals for the

Ninth Circuit on the form made and entered herein on the 23 day of April, A. D. 1929, as more fully appears in the assignment of errors and bill of exceptions herein filed.

JOHN C. GUNG'L,
United States Attorney,
By LEMUEL P. MATHEWS,
Assistant United States Attorney.

[Indorsements]: Copy received this 11th day of April, 1929.

WM. R. MISBAUGH,
Attorney for Plaintiff.

Filed Apr. 23, 1929. [44]

[Title of Court and Cause.]

PETITION FOR APPEAL TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable WILLIAM H. SAWTELLE, Judge of the District Court of the United States for the District of Arizona:

The above-named defendants through *its* attorney, Lemuel P. Mathews, Assistant United States Attorney for the District of Arizona, conceiving itself aggrieved by the judgment made and entered on the 14th day of December, A. D. 1928, and the order denying defendant's Motion for a New Trial made and entered on the 7th day of February, A. D. 1929, in the above-entitled cause, does hereby

appeal from the said judgment and order to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors which is filed herewith and prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers from which said judgment and order was made, duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

JOHN C. GUNG'L,
United States Attorney.
By LEMUEL P. MATHEWS,
Assistant United States Attorney.

[Indorsements]: Copy received this 11th day of April, 1929.

WM. R. MISBAUGH,
Attorney for Plaintiff.

Filed Apr. 23, 1929. [45]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the United States of America, the defendants by Lemuel P. Mathews, Assistant United States Attorney for the District of Arizona, and makes the following assignment of errors, which it avers occured at said hearing, and prays for a reversal of the judgment as prayed for in its Petition upon appeal:

"In that the Court erred in refusing to consider the plea of estoppel affirmatively set up in the pleadings.

II.

The Court erred in refusing to grant the motion of the defendant in the trial court for a directed verdict on the plea of estoppel based on the pleadings.

III.

The Court erred in permitting, over objection and exception, the introduction into evidence of certain examinations from the file by the plaintiff in the trial Court.

IV.

The Court erred in rendering judgment for the plaintiff in the trial Court as a matter of law by reason of estoppel introduced by the defendant in the trial court.

V.

The Court erred in refusing to grant the motion of the defendant in the trial Court for dismissal on the ground that the plaintiff did and could work subsequent to discharge from the service and therefore was not permanently and totally disabled.

VI.

The Court erred in refusing to grant the motion for a new trial of the defendant in the trial court. [46]

VII.

The Court erred in finding as a conclusion of law that the plea of estoppel did not apply.

VIII.

The Court erred in finding as a fact that the plaintiff in the trial court was permanently and totally disabled at discharge in view of work record introduced by the defendant in the trial court.

IX.

The Court erred in refusing to find as a conclusion of law that the plaintiff was not permanently and totally disabled based on the evidence and the definition of permanent total disability."

WHEREFORE, the defendants pray that the said judgment be reversed.

JOHN C. GUNG'L,
United States Attorney.
By LEMUEL P. MATHEWS,
Assistant United States Attorney.

[Indorsements]: Copy received this 11th day of April, 1929.

WM. R. MISBAUGH,
Attorney for Plaintiff.

Filed Apr. 23, 1929. [47]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

At chambers before the Honorable JEREMIAH NETERER, United States District Judge, the following proceedings were had:

In this cause on motion of counsel for the defendants, and it appearing to the Court that the above-

named defendants have heretofore filed its petition for an allowance of an appeal and concurrently therewith its assignment of errors;

IT IS ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, directing from the judgment in this cause, made and entered on the 14th day of February, 1929, and the order denying defendants' motion for a new trial, made and entered on the 7th day of February, 1929, be and the same is hereby allowed to said defendants, and

IT IS FURTHER ORDERED, that the transcript of record, proceedings and all papers, will be transmitted by the Clerk of this court to the said United States Circuit Court of Appeals for the Ninth Circuit, be treated, considered and duly authenticated as a transcript of the record, proceedings and papers upon which this appeal is based and transmitted to said United States Circuit Court of Appeals for its consideration in connection with said appeal.

JEREMIAH NETERER,
United States District Judge.

Apr. 15, 1929.

[Indorsement]: Filed Apr. 23, 1929. [48]

[Title of Court and Cause.]

DECISION (ON MOTION TO STRIKE BILL OF EXCEPTIONS).

Filed May 6, 1929.

WM. R. MISBAUGH, Attorney for Plaintiff.

JOHN B. WRIGHT, U. S. Attorney, LEMUEL P. MATTHEWS, Asst. U. S. Attorney, Attorneys for Defendant.

The plaintiff moves to strike the proposed bill of exceptions for failure to file within ten days after rendition of the decision, as provided by court rules, and for the further reason that the exceptions are wholly insufficient and merely proposed findings rather than protest against the ruling of the court.

At the conclusion of the trial, December 11, oral decision was announced by the Court, and formal written findings and decision were filed a day or two thereafter and a typed copy mailed to all parties to this action. On December 12, on motion of the defendant "desiring to have the bill of exceptions settled for the purpose of a writ of error," an order was entered extending the present term for the period of sixty days "for the purpose of presenting and having settled the bill of exceptions," "provided, however, that the proposed bill of exceptions shall be prepared and served by the party proposing the same upon the opposite party, and any proposed amendments and alterations

thereof served by said opposite party and the same presented to the presiding judge within the time and in the manner provided by Rule 76 of this court."

Rule 76 provides that the "party desiring the bill shall within ten days after written notice of the rendition of the decision serve upon the adverse party a draft of the proposed bill of exceptions, accompanied by a concise statement of so much of the evidence as is necessary to [49] explain the exception and its relation to the case. Within ten days after service the adverse party may serve upon the proposing party proposed amendments, to be delivered thereafter within five days to the clerk for the judge; and the clerk, as soon as practicable, to deliver the proposed bill and the amendments to the judge, who shall designate a time at which he will settle the bill."

The proposed bill of exceptions was served by the defendant on the attorneys for the plaintiff on the 11th day of April, 1929,—four months after rendition of the decision,—and filed with the Clerk of the court on the 23d day of April, 1929. The motion to strike was served on the 23d day of April, 1929, and filed on the same day in the Clerk's office; and thereafter the proposed bill of exceptions and the motion were delivered to the Presiding Judge by mail.

Before the Court can allow or certify a bill of exceptions the party excepting must in a formal statement set forth exceptions taken at the trial to the decision, with so much of the testimony as

is necessary to enable the Appellate Court to say whether error was committed in respect to the particular decision. The purpose is to preserve and certify a report of the proceedings at the trial which do not otherwise appear upon the formal record of the proceedings, and so much of the evidence shall be embraced in the bill of exceptions as may be necessary to present clearly the questions of law involved in the rulings, to which the exceptions are taken.

The evidence should be set forth in condensed and narrative form, unless for a proper understanding it should be set forth otherwise. The proposed bill is no bill of exceptions. It is merely a statement of conclusions: Paragraph 1, 2, 3, 4, and 5, do not comprehend or embody any finding or ruling of the Court. The formal findings of the Court are not set out or any exceptions thereto; and the reference to request for production of medical report referred to as "page 4 of the transcript," does not disclose [50] any objection, but merely an exception without any reason, and no statement of evidence leading to the request; and to the offer referred to as "page 18 of the transcript," of the medical examination of the deceased on his admission to the Government hospital November 3, 1919: "Guffy for the defendant, 'That is objected to for the reason stated to the other offer,' " no objection appears in the proposed bill. And "page 29 of the transcript of the evidence," to the question propounded to the doctor on the stand, there is no statement of evidence leading to the question, and the

objection that it does not contain all the facts that have been offered in evidence, in the absence, in the proposed bill, of the evidence as to the facts, amounts to nothing.

Motion to strike is granted.

NETERER,
United States District *Court.*

[Indorsements]: Filed May 6, 1929. [51]

[Title of Court and Cause.]

EXCEPTION TO DECISION ON MOTION TO STRIKE BILL OF EXCEPTIONS.

Comes now the defendants and excepts to the decision of the Court striking the bill of exceptions heretofore filed, from the following grounds:

1. That this Court is without jurisdiction to strike the bill of exceptions.

2. That the order heretofore made by the Presiding Judge dated at Tucson the 12th day of December, 1928, a copy of said order hereto attached extends the time for the purpose of settling the bill of exceptions to sixty days from the end of the present term, which is May 1st, 1929.

JOHN C. GUNG'L,
United States Attorney.
LEMUEL P. MATHEWS.
By LEMUEL P. MATHEWS,
Asst. United States Attorney,
Attorney for Defendants.

[Indorsements]: Filed May 9, 1929. [52]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit upon the appeal heretofore allowed by said Court, and include in said transcript the following pleadings, proceedings and prayers on file to wit:

1. Complaint.
2. Summons.
3. Motion to strike.
4. Order allowing motion to strike.
5. Supplemental complaint.
6. Demurrer to answer.
7. Minute entry sustaining demurrer.
8. First amended answer.
9. Second amended answer.
10. Judgment.
11. Minute entries of judgment.
12. First amended judgment.
13. Motion for a new trial.
14. Order denying new trial.
15. Clerk's certificate.
16. Petition for appeal. [53]
17. *Petition for appeal.*
18. Assignment of errors.
19. Bill of exceptions.

20. Notice of appeal.
21. Order allowing appeal.
22. Citation.

Dated this the —— day of April, 1929.

JOHN C. GUNG'L,
United States Attorney.
By LEMUEL P. MATHEWS,
Assistant United States Attorney.

Acceptance of service of the foregoing praecipe received this the —— day of April, 1929.

[Indorsements]: Copy received this 11th day of April, 1929.

WM. R. MISBAUGH,
Attorney for Plaintiff.

Filed Apr. 23, 1929. [54]

[Title of Court and Cause.]

SUPPLEMENTAL PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please prepare in addition to the records heretofore called for and filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit and include in said transcript the following pleadings, to wit:

1. Order extending the time to settle bill of exceptions.
2. Decision and finding of fact of the Trial Judge.

3. Decision of the Trial Judge on motion to strike bill of exceptions.
4. Exception to the decision on motion to strike bill of exceptions.
5. This supplement*le* praecipe.

The above request is based upon the records of this action, together with the decision of the Trial Judge striking defendant's bill of exceptions.

Dated this 7th day of May, 1929.

JOHN C. GUNG'L,
United States Attorney.
LEMUEL P. MATHEWS.
By LEMUEL P. MATHEWS,
Asst. United States Attorney.

State of Arizona,
County of Maricopa,—ss.

Lemuel P. Mathews being first duly sworn, on oath says that he is Assistant United States Attorney for the District of Arizona, and attorney for defendants in the above action on appeal; that he caused to be deposited in the United States post-office in Phoenix, Arizona, on May 7th, 1929, an envelope containing copies of the order of the Hon. [55] Jeremiah Neterer, extending the time to settle bill of exceptions and a copy of the decision and finding of fact of the Hon. Jeremiah Neterer, dated the 3d day of January, 1929. Said envelope containing said papers being properly addressed and mailed to Wm. R. Misbaugh, attorney for plaintiff, at Tucson, Arizona.

LEMUEL P. MATHEWS.

Subscribed and sworn to before me this 7 day of May, 1929.

[Seal] D. A. LITTLE,
Notary Public.

[Indorsement]: Filed May 9, 1929. [56]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the District Court of the United States, for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files in the said court, including the records, papers and files in the case of Fannie Underwood Larsen, Executrix of the Estate of Orville Larsen, Deceased, Plaintiff, vs. United States of America, numbered L.–423—Tucson, on the docket of said court.

I further certify that the attached pages, numbered 1 to 57, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in the praecipe filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk, in the city of Tucson, State

and District aforesaid, except as follows: the fourth item in the original praecipe calls for "Order Allowing Motion to Strike." My record shows that the order which was made April 8, 1927, was one overruling the motion, which order is a part of this record. The seventh item under the original praecipe calls for "Minute Entry Sustaining Demurrer," whereas my record shows that plaintiff's demurrer to second amended answer was overruled September 17, 1928, which order is a part of this record. No bill of exceptions is included in the transcript for the reason that none has been allowed by the District Judge who tried the case.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of $13.50 and that a constructive charge has been made against the United States for the same.

I further certify that the original citation issued in the said cause is hereto attached and made a part of this record.

WITNESS my hand and the seal of the said court this 13th day of May, 1929.

[Seal] C. R. McFALL,
Clerk.
ARCHIE L. GEE.
By ARCHIE L. GEE,
Deputy Clerk. [57]

[Title of Court and Cause.]

CITATION.

By the Honorable WILLIAM H. SAWTELLE, United States District Judge for the District of Arizona in the Ninth Circuit to Fannie Underwood Larsen, Executrix of the Estate of Orville Larson, Deceased, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco, State of California, in the District and Circuit above named on the 15 day of May, A. D. 1929, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the District of Arizona, wherein the United States of America are appellants and you are appellee to show cause, if any there be, why the judgment and order entered in said cause mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the city of Tucson, State of Arizona, in the district and circuit above named, this the 15 day of April, in the year of our Lord one thousand nine hundred and twenty-nine and in the Independence of the United States the one hundred and fifty-third.

JEREMIAH NETERER,
United States District Judge.

Copy received this 11th day of April, 1929.

WM. R. MISBAUGH,
Attorney for Plaintiff.

Filed Apr. 23, 1929.

[Endorsed]: No. 5818. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Fannie Underwood Larsen, Executrix of the Estate of Orville Larsen, Deceased, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Arizona.

Filed May 15, 1929.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5821

United States
Circuit Court of Appeals
For the Ninth Circuit.

ROYAL PACKING COMPANY, a Corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record.

UPON PETITION TO REVIEW AN ORDER OF THE UNITED STATES BOARD OF TAX APPEALS.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 5821

United States
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For the Ninth Circuit.

ROYAL PACKING COMPANY, a Corporation,
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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index. Page

[1*] DOCKET No. 3962.

ROYAL PACKING CO.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

For Taxpayer: D. W. EGAN, Esq.
DAN J. CHAPIN, Esq.
For Commissioner: G. E. ADAMS, Esq.
J. A. ADAMS, Esq.

DOCKET ENTRIES.

1925.

May 6. Petition received and filed.
" 9. Copy of petition served on solicitor.
" 9. Notification of receipt mailed taxpayer.
" 29. Answer filed by solicitor.
June 5. Copy of answer served on taxpayer—assigned to Field Calendar.

1926.

Mar. 26. Hearing set for 5–5–26—Los Angeles.
Apr. 7. Motion to amend answer, with answer, filed by solicitor.
Apr. 12. Copy of motion served on taxpayer—5–5–26.
May 6. Hearing had—Div. 3—on merits—taxpayer brief due 6–15–26—submitted.
" 28. Transcript filed.

*Page-number appearing at top of page of original certified Transcript of Record.

June 2. Brief filed by taxpayer.
" 4. Copy of brief served on solicitor—taxpayer notified.
Oct. 13. Finding of fact and opinion rendered. Judgment will be entered for the Commr. Both sides notified.
" 16. Order of redetermination; signed and filed; both sides notified.

1927.

Mar. 4. Motion to amend order of redetermination filed by G. C.
" 7. Order amending order of redetermination signed and filed. Both sides notified.
" 11. Motion to vacate order of 3–7–27 and redetermine the deficiency filed by G. C.
" 14. Order amending order of 3–7–27 signed and filed. Both sides notified.
" 30. Supersedeas bond for $20,000 approved and filed.
" 30. Original writ of error of U. S. Appellate Court, Ninth Circuit, San Francisco, received.
" 30. Copy of citation on writ of error filed.
" 30. Copy of petition for writ of error filed.
" 30. Copy of assignment of errors filed.
" 30. Praecipe re designation of record filed by taxpayer.
Apr. 13. Transcript *sur* writ of error forwarded Clerk Ninth Circuit, San Francisco.

Dec. 7. Mandate from U. S. Circuit Court of Appeals, Ninth Circuit, reversing Board's decision and remanding case to Board for rehearing filed.

" 7. Order—proceeding set for 1–17–28—entered.

Jan. 3. Motion to set for a rehearing, filed by taxpayer at Los Angeles, Calif., filed.

" 6. Ordered, proceeding placed on circuit calendar for hearing in Los Angeles next session—entered.

Feb. 20. Hearing set 4–17–28 at Los Angeles, Calif.

Apr. 13. Hearing had before Mr. Milliken on merits. Briefs due in 60 days.

May 14. Transcript of hearing 4–13–28.

June 2. Brief filed by taxpayer.

" 8. Brief filed by G. C.

[2]

1928.

Oct. 4. Findings of fact and opinion rendered. Judgment for respondent.

" 6. Order of redetermination—entered.

Dec. 26. Petition for review by U. S. Circuit Court of Appeals (9), with assignments of error filed by taxpayer.

1929.

Jan. 16. Statement of evidence lodged.

" 22. Proof of service of petition and statement filed.

Feb. 25. Order enlarging time to 4–1–29 for preparation of evidence and transmission and delivery of record—entered.

Mar. 13. Praecipe filed by taxpayer.

" 13. Affidavit of service of praecipe and notice of hearing 3–25–29 filed.

" 13. Notice of hearing 3–25–29 to settle record—filed.

" 25. Order rejecting petitioner's statement of evidence; allowing petitioner and respondent 45 days to lodge another statement of evidence and to serve the opposite party with a copy within 15 days and placing on the day calendar of May 29, 1929, for hearing on settlement of statement of evidence, entered.

Mar. 30. Order enlarging time to 6–15–29 for preparation of evidence and transmission and delivery of records, entered.

Mar. 29. Transcript of hearing 3–25–29 filed.

Apr. 25. Agreed statement of evidence lodged. Approved and ordered filed 4–26–29.

Now, April 30, 1929, the foregoing docket entries certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[3] Filed May 6, 1925. United States Board of Tax Appeals.

[Letter-head of Royal Packing Company.]

United States Board of Tax Appeals.

DOCKET NUMBER 3962.

Appeal of ROYAL PACKING COMPANY, of 1815 Sacramento St., Los Angeles, California.

PETITION.

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue as set forth in his deficiency letter (IT: CA:2557–4–60–D) dated March 7, 1925, and as the basis of its appeal sets forth the following:

1. The taxpayer is a California corporation with principal office at Los Angeles, California.
2. The deficiency letter (a copy of which is attached) was indicated to have been mailed on March 7, 1925.
3. The taxes in controversy are income and profits taxes for the fiscal year ending January 31, 1919, the sum in dispute being less than $10,000.00, namely, $9,792.85, and being a part of the total deficiency proposed to be assessed for that fiscal period of $13,194.26. The revision sought in this appeal brings about, if granted, certain revisions for succeeding fiscal periods which are in lesser amount and entirely incidental to this appeal.

4. The determination of tax contained in the said deficiency letter is based upon the following error:

That the Commissioner has declined to recognize a certain loss as having been determined and suffered within the fiscal period ending January 31, 1919, he contending that the loss was not determined until within the following fiscal period. This [4] loss resulted from an investment made by the Royal Packing Company in stock of the Universal Packing Company.

5. The facts upon which the taxpayer relies as the basis of its appeal are as follows:

   a. The Universal Packing Company, of Fresno, California, was organized and began operations in 1917. Common stock was issued at par, the proceeds being used to construct the plant and install the equipment. Preferred stock was later issued at par to raise additional funds for working capital. The Royal Packing Company subscribed to $15,000.00 of the common stock but to none of the preferred stock.

   b. The two corporations were not affiliated in any way whatever.

   c. The enterprise of meat packing embarked in by the Universal Packing Company proved a failure from the start and the the plant was closed and operations ceased just prior to November 1, 1918. Endeavor was then begun to dispose of

the plant and equipment at whatever price it would bring, and a sale was finally effected on October 1, 1919, at a sum which allowed for payment to the creditors in full, payment to the preferred stockholders of $1.004 per share of $100.00 originally paid in, and nothing whatever to the common stockholders.

6. The taxpayer, in support of its appeal, relies upon the following provisions of Section 234 (a) (4) of the Revenue Act of 1918:

"That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

"Losses sustained during the taxable year and not compensated for by insurance or otherwise."

WHEREFORE, the taxpayer respectfully prays that its appeal from the decision of the Commissioner disallowing the deduction of the loss in question against income for the fiscal period ending January 31, 1919, may be heard and determined before that division of the Board of Tax Appeals which will sit in the City of Los Angeles during the month of July, 1925, or thereabouts.

ROYAL PACKING COMPANY.
By LOUIS M. COLE, President,
Taxpayer.

State of California,
County of Los Angeles,—ss.

Louis M. Cole, personally known to me to be the president of the Royal Packing Company, being duly sworn, says that the facts stated in the foregoing petition are true to his best knowledge and belief.

Sworn to before me this 30 day of April, 1925.

[Seal] JAMES S. JONES,

Notary Public in and for the County of Los Angeles, State of California.

My commission expires Nov. 9, 1926.

[5] Filed May 6, 1925.

TREASURY DEPARTMENT,
Washington.

Office of
Commissioner of Internal Revenue.

March 7, 1925.

IT:CA:2557–4–60–D
Royal Packing Company,
1815 Sacramento Street,
Los Angeles, California.

Sirs:

A reexamination of your returns for the fiscal years ended January 31, 1919, to January 31, 1922, inclusive, pursuant to an examination of your books of account and records, and in connection with your protest dated September 2, 1924, discloses a net deficiency of $13,168.89, as shown in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1924, you are allowed 60 days from the date of mailing of this letter within which to file an appeal to the United States Board of Tax Appeals testing in whole or in part the correctness of this determination.

Where a taxpayer has been given an opportunity to appeal to the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the inclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:CA:2557–4–60–D. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,

D. H. BLAIR,
Commissioner.

By J. G. BRIGHT (Signed),
Deputy Commissioner.

Inclosures:

Statements

Agreement—Form A

Now, April 30, 1929, the foregoing petition certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[6] Filed May 23, 1925. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 3962.

Appeal of ROYAL PACKING COMPANY, 1815 Sacramento Street, Los Angeles, California.

ANSWER.

The Commissioner of Internal Revenue by his attorney, A. W. Gregg, Solicitor of Internal Revenue, for answer to the petition of the above-named taxpayer admits, denies, and alleges as follows:

(1) Admits the allegations of paragraphs one, two, and three.

(2) Denies that he erred in computing the deficiency contained in the letter of March 7, 1825.

(3) Admits that the Universal Packing Company of Fresno, California, was organized and began operations in 1917.

(4) Admits that the common and preferred stock was issued at par.

(5) Admits that the Royal Packing Company subscribed to $15,000 of common stock.

(6) Admits that the taxpayer and the Universal Packing Company were not affiliated.

(7) Denies that the enterprise of meat packing embarked in by the Universal Packing Company proved a failure from the start.

(8) Admits that the plant of the Universal Packing Company was closed and operations ceased just prior to November 1, 1918.

(9) For want of information denies that an endeavor was then begun to dispose of the plant and equipment at whatever price it would bring.

(10) Admits that a sale was effected on October 1, 1919.

(11) Admits that nothing whatever was *was* paid to the common stockholders.

[7] (12) Denies generally and specifically each and every allegation contained in the taxpayer's petition not hereinbefore admitted, qualified or denied.

PROPOSITION OF LAW.

Under Section 234 (a) (4) of the Revenue Act of 1918 only those losses which are sustained during the taxable year are deductible from gross income.

WHEREFORE, it is prayed that the appeal of the taxpayer be denied.

A. W. GREGG,
Solicitor of Internal Revenue,
Attorney for Commissioner of Internal Revenue.
Of Counsel:
LEE I. PARK, Special Attorney,
Bureau of Internal Revenue.

Now, April 30, 1929, the foregoing answer certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[8] Filed Apr. 7, 1926. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 3962.

Appeal of ROYAL PACKING COMPANY, 1815 Sacramento Street, Los Angeles, California.

MOTION.

Comes now the Commissioner of Internal Revenue, by his attorney, A. W. Gregg, Solicitor of Internal Revenue, and moves that the Commissioner be given authority to amend his answer heretofore filed to the petition filed in the above-named case.

ANSWER.

Assuming that the above motion will be granted, the Commissioner of Internal Revenue, by his attorney, A. W. Gregg, Solicitor of Internal Revenue, for amended answer to the petition filed in the above-named case admits and denies as follows:

(1) Admits the allegations of paragraphs one, two and three.

(2) Denies that he erred in computing the deficiency contained in the letter of March 7, 1925.

(3) Admits that the Universal Packing Company of Fresno, California, was organized and began operations in 1917.

(4) Denies that the common and preferred stock of the Universal Packing Company was issued at par.

(5) Denies that the Royal Packing Company subscribed to $15,000 of common stock of the Universal Packing Company.

(6) Admits that the taxpayer and the Universal Packing Company were not affiliated.

[9] (7) Denies that the enterprise of meat packing embarked in by the Universal Packing Company proved a failure from the start.

(8) Admits that the plant of the Universal Packing Company was closed and operations ceased just prior to November 1, 1918.

(9) For want of information denies that an endeavor was then begun to dispose of the plant and equipment at whatever price it would bring.

(10) Admits that a sale was effected on October 1, 1919.

(11) Admits that nothing whatever was paid to the common stockholders.

(12) Denies generally and specifically each and every allegation contained in the taxpayer's petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the appeal of the taxpayer be denied.

A. W. GREGG,
Solicitor of Internal Revenue,
Attorney for Commissioner of Internal Revenue.
Of Counsel:
G. E. ADAMS,
Special Attorney, Bureau of Internal Revenue.

Now, April 30, 1929, the foregoing motion and answer certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[10] United States Board of Tax Appeals.

DOCKET No. 3962.

ROYAL PACKING COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Decided October 13, 1926.

Upon the evidence, *held,* that the loss taken as a deduction from gross income of the petitioner for the year ended January 31, 1919, was not realized during such taxable year.

D. WEBSTER EGAN, Esq., for the Petitioner.

GEORGE E. ADAMS, Esq., for the Respondent.

FINDINGS OF FACT AND OPINION.

This proceeding is an appeal from the Commissioner's determination of a deficiency in income and profits taxes for the fiscal year ended January 31, 1919, in the amount of $9,792.85. It arises from the refusal of the Commissioner to allow petitioner's deduction of an alleged loss of $15,000, occasioned by the failure of a corporation in which the petitioner was a stockholder.

FINDINGS OF FACT.

The petitioner is a corporation engaged in the packing business at Los Angeles, California. Prior to April 1, 1918, it invested $10,000 in the common stock of the Universal Packing Company of Fresno, California, a corporation organized in 1916. The first purchase of its stock was made by the petitioner on November 25, 1916. This was paid *for the* company's check for $2,500. Other purchases of stock were made April 26, June 16, and July 24, 1917, respectively, for which the total amount of $7,500 was paid. In January or February, 1918, petitioner's president learned that the Universal Packing Company was short of funds. He thereupon arranged to purchase for his company additional common stock of the par value of $5,000, and payment therefor was made by the petitioner on March 29, 1918. This last [11] purchase was made for the protection of the prior investments of the company. All purchases were made at par.

The Universal Packing Company began operations in 1917 and from the beginning was a failure financially. June 1, 1918, the Universal Packing Company levied an assessment of $14 per share on all its capital stock, notice of which was duly published on June 3, 10, 17, 24, and July 1 and 5, 1918. The petitioner did not pay this assessment. On November 1, 1918, or immediately prior to that date, the Universal Packing Company closed its doors and ceased to function. Petitioner charged off on its books $12,000 as of January 31, 1919, and $3,000 as of January 31, 1920, and claimed deductions therefor in its tax returns for the taxable years ending on those dated, respectively. On July 12, 1924, it made entries on its books correcting the charge-off as of January 31, 1920, and making it as of January 31, 1919. It now claims the deduction of $15,000 in the determination of its taxes for the fiscal year ended January 31, 1919.

OPINION.

LANSDON.—The law under which the petitioner claims is as follows:

> "Sec. 234 (a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions * * *
>
> (4) Losses sustained during the taxable year and not compensated for by insurance or otherwise." (Revenue Act of 1918.)

To prevail in its contention the petitioner must prove that the loss was sustained in the taxable

year. The evidence is clear that the Universal Packing Company became insolvent and ceased to function prior to November 1, 1918, a date within the taxable year. It is also in evidence that the insolvent corporation owned certain assets and that the sale of such assets and the final liquidation of its [12] business were not completed within the fiscal year ended January 31, 1919. There is no convincing evidence that any loss was sustained in the taxable year.

Judgment will be entered for the Commissioner.

Now, April 30, 1929, the foregoing findings of fact and opinion certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[13] United States Board of Tax Appeals, Washington.

DOCKET No. 3962.

ROYAL PACKING COMPANY,
Petitioner.

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER AMENDING ORDER OF MARCH 7, 1927, REDETERMINING DEFICIENCY.

Upon motion of respondent and for good cause shown, it is ORDERED, that the order made and

entered herein March 7, 1927, modifying and amending the order of redetermination entered October 16, 1926, be and is hereby amended in that the income and profits taxes referred to in said order of March 7, 1927, shall be and hereby are set forth as taxes for the fiscal year ended January 31, 1919, instead of for the fiscal years ending January 31, 1919, to January 31, 1922, inclusive; that the deficiency for said fiscal year ended January 31, 1919, is $13,194.26; and that the concluding paragraph of said order of March 7, 1927, be and is amended to read:

"ORDERED that the order of redetermination entered on October 16, 1926, be and the same is hereby modified and amended to the extent that the deficiency for the fiscal year ended January 31, 1919, is redetermined to be in the amount of $13,194.26."

(Signed) C. ROGERS ARUNDELL,
Acting Chairman, United States Board of Tax Appeals.

True copy: Teste.
Dated, March 15, 1927.
BDG–o

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Now, April 30, 1929, the foregoing order amending order of March 7, 1927, redetermining deficiency certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[14] True copy: Teste.

[Seal] B. D. Gamble, Clerk U. S. Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 3962.

ROYAL PACKING COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Promulgated October 4, 1928.

For lack of evidence *held* that an alleged loss taken as a deduction from gross income for the fiscal year ending January 31, 1919, was not sustained during such taxable year.

DAN J. CHAPIN, Esq., for the Petitioner.

J. ARTHUR ADAMS, Esq., and ALVA C. BAIRD, Esq., for the Respondent.

FINDINGS OF FACT AND OPINION.

This proceeding involves the redetermination of deficiencies in income and profits taxes for the fiscal year ended January 31, 1919, in the amount of $13,194.26. The sole issue is whether respondent erred in refusing to allow petitioner a deduction for the fiscal year ended January 31, 1919, of $15,000 representing alleged loss on the stock of another corporation.

FINDINGS OF FACT.

Petitioner is a corporation organized under the laws of the State of California, with its principal office at Los Angeles, California, and is engaged in the canning and packing business. It keeps its books and makes its income tax returns on the basis of fiscal years ending on January 31st. During the fiscal year ending January 31, 1919, it had outstanding capital stock in the amount of $100,000 and a surplus of approximately $20,000.

The Universal Packing Company, hereafter referred to as Packing Company, was organized in the latter part of 1916 or the early part of [15] 1917 and was engaged in the meat-packing business at Fresno, California. Its capital stock as of November 1, 1918, amounted to the par value of $346,400, of which $69,000 was preferred stock and $277,400 was common stock. It erected a plant which was completed during the latter part of 1917 at a cost of approximately $300,000. It had been estimated that the cost of this plant would be $125,000. This increase in the cost of the plant exhausted its then paid-in capital. It had no credit with banks. To secure working capital it was determined in January, 1918 at a meeting of the stockholders to issue additional stock. Such stock was issued.

Petitioner first and last subscribed and paid for $15,000 par value of common stock of Packing Company. The last purchase was made of the addi-

tional stock issued pursuant to the action of the stockholders at the meeting held in January or February, 1918. This latter subscription was paid in the amount of $5,000 on March 29, 1918. At the same time, petitioner's president took $20,000 par value of Packing Company stock. Shortly after June 1, 1918, Packing Company made an assessment of $14 per share on its stockholders, both common and preferred. Petitioner did not pay this assessment. In order to avoid the payment of such an assessment petitioner transferred all its Packing Company stock to C. J. Walden. Entries on petitioner's books indicated that $5,000 par value of the stock was transferred to Walden and that Walden had executed his note to petitioner for that amount. No such note was executed and all the stock was from the date of purchase the property of petitioner.

Packing Company operated spasmodically during 1918 and from the beginning made no profits. It was not equipped so as to comply with Federal statutes and regulations relative to meat packing. It shut [16] down its plant on November 1, 1918, and never reopened. The plant was sold in October, 1919, and the company thereupon was liquidated. The common stockholders received nothing on their stock.

On or about January 31, 1919, petitioner's president, who owned 95 per cent of its stock, directed its bookkeeper to charge off as a loss as of January 31, 1919, its stock of Packing Company to the extent of $12,000. Such entry was made. At the direc-

tion of the president an entry was made on petitioner's books as of January 31, 1920, charging off the remaining $3,000. In 1924 a revenue agent investigated petitioner's books and tax returns and determined that the whole loss was sustained in the fiscal year ending January 31, 1920, and so informed petitioner's president, who then claimed that the whole loss was sustained in the fiscal year ending January 31, 1919. The revenue agent then indicated that if such claim was to be made, the entry should be changed so as to reflect this contention. Thereupon entries were made which charged the whole loss to the fiscal year ending January 31, 1919. In determining the deficiency for the fiscal year ended January 31, 1919, the respondent refused to allow as a deduction the entire loss claimed.

OPINION.

MILLIKEN.—The sole issue in this proceeding was decided by the Board on October 13, 1926, adversely to petitioner. See 5 B. T. A. 55. Thereafter this proceeding was taken by petitioner on writ of error to the Circuit Court of Appeals for the Ninth Circuit. That Court reversed the decision of the Board. See 22 Fed. (2d) 536. After stating the issue and quoting the whole of our findings of fact and our opinion, the Court said:

[17] The applicable principles of law are not in controversy, and we content ourselves with little more than a bare statement of them. The taxpayer was not entitled to the deduction merely because the stock may have subsequently become worthless or

because, in the light only of subsequent developments, it may appear to have been inherently worthless during the year in question. Nor can the deduction be claimed for a mere shrinkage in value. A loss may be said to be actually sustained in a given year if, within that year, it reasonably appears that such stock has, in fact, become worthless. It is not requisite that there be a charge-off on the books of the taxpayer, and the ultimate fact of worthlessness may be shown by circumstances, as in other cases where that question is in issue. But the burden is on the taxpayer to establish the fact by reasonably convincing evidence. * * * (Here follows numerous citations) * * * .

Giving to terms their proper legal significance, vital parts of the Board's decision seem to be irreconcilably inconsistent with each other. It is said that "the Universal Packing Company began operations in 1917 and from the beginning was a failure financially"; and that "the evidence is clear that the Universal Packing Company became insolvent and ceased to function prior to November 1, 1918, a date within the taxable year." And yet it is further stated that "there is no convincing evidence that any loss was sustained in that taxable year." But how could the stock, and partcularly the common stock, of such a corporation, out of business and wholly insolvent, be of any value? And adding to the confusion is the fact that, as we view it, the evidence fails to warrant either of the first two statements. The record may suggest the possibility but it is so meager, disconnected, and

altogether inadequate, as to leave the ultimate facts largely to conjecture and speculation. Moreover, if it was intended to hold that "there was no convincing evidence that any loss was sustained in the taxable year" because, as stated, the sale of the assets of the corporation and the "final liquidation of its business were not completed within the fiscal year," the reasoning is deemed to be invalid.

Upon a review in this class of cases, we are given the "power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice [18] may require." Section 1003 (b), Revenue Act 1926, pt. 2, 44 Stat. 110 (26 U. S. C. A.,§ 1226). Questions of fact are exclusively for the Board, except that we may consider whether its findings are supported by any substantial evidence. Senate Committee Report 52, Sixty-Ninth Congress, First Session, p. 36.

We are of the opinion that justice requires a reversal of the decision, and that the case be remanded for rehearing; and such will be the order, without costs.

This opinion is the law of this case. It therefore becomes our duty to determine whether petitioner has met the burden of proof imposed upon it by establishing by reasonably convincing evidence that it was apparent in its fiscal year ending January 31, 1919, that its stock of Packing Company was worthless. The Court in referring to the record made in the previous hearing stated "The record

may suggest the possibility of a loss but it is so meager, disconnected, and altogether inadequate, as to leave the ultimate facts largely to conjecture and speculation." Petitioner was therefore put on notice of the shortcomings of the previous record and at the second hearing of this cause should be expected to rectify the same. To prove that the stock was in fact worthless in that year, it is not sufficient for petitioner to show only that subsequent developments proved it to have been worthless. Petitioner introduced at the hearing four witnesses—its president, a tax consultant, the vice-president of Packing Company, and a banker.

Petitioner's president, who owned 95 per cent of its capital stock, in January, 1919, directed its bookkeeper to charge off as of January 31, 1919, the amount of $12,000 as a loss on its Packing [19] Company stock and in the next January directed that the remaining $3,000 be charged off as a loss occurring in the fiscal year ending January 31, 1920. Entries were made pursuant to those instructions. He testified that he was a bookkeeper and "thoroughly experienced with the elements of bookkeeping and accounting" so that the charge on the books of account meant more to him than to the average business man. Giving full effect to the fact that no charge off was requisite in order to establish a loss, the fact remains that these charges, made pursuant to the direction of the president, have a material bearing on the question whether this witness was on the date of the first entry of opinion that the

stock was wholly worthless or had only shrunk in value to the extent shown by the entry.

We are not impressed by this witness' explanations of these entries. Subsequent events appear to have made a deeper impression on his memory than then existing circumstances. It is significant that no change was made in these entries until 1924, or more than five years after the date of the first entry. At that time a change was made only after the revenue agent had determined not to allow any part of the loss in the fiscal year ending January 31, 1919, and to allow the whole loss in the next subsequent fiscal year. Thus, up to the year 1924, it appears that petitioner's books reflected the opinion of its president that the loss was only partial, that is, that the value of the stock had shrunk. While we are of opinion that these entries reflected as of the dates they were made the then concept of this witness, it does not appear that he then had any real knowledge of the [20] financial condition of Packing Company. He testified at the hearing (April 13, 1928) that he did not even then know the amount of the liabilities of Packing Company and that he did not know until the year in which the latter hearing was had what was its capitalization. In the absence of those factors, he could have no real conception of the value of the stock.

In order to show that this common stock was worthless in the fiscal year ending January 31, 1919, this witness testified that he had heard in 1919 and at the time he heard of the sale of the plant of Packing Company, which occurred in October, 1919, that

the preferred stockholders had received only $1.004 on each share of the par value of $100. No attempt was made to prove such fact by testimony of any person who knew it of his own personal knowledge. No preferred stockholder was introduced as a witness. On cross-examination it was brought out that this witness had testified at the former hearing that he did not know when the plant was sold; that he had never been definitely informed but that he thought it was in 1919. In view of the character of this testimony, we have been unable to find as a fact what amount, if any, the preferred stockholders received for their stock. Petitioner's president has failed to give any reasonably convincing testimony that at any time during the fiscal year ending January 31, 1919, he had reasonable grounds to believe that this stock was worthless.

The tax consultant testified only as to the change in the entries made in petitioner's books in 1924 when the whole loss was charged to the fiscal year ending January 31, 1919. His testimony is set forth in [21] our findings of fact.

The vice-president of Packing Company is the only witness who was directly connected with that company and who attempts to testify as to any substantive fact relative to its financial condition. He had for twenty years prior to his connection with this company been in the employ of Cudahy Packing Company,—in what capacity does not appear.

He was employed by Packing Company as its practical man and it was distinctly understood that he was to have nothing to do with its financial

affairs. He left the employ of the company in September, 1918. This witness placed the liabilities of Packing Company as of a date not shown as between $120,000 and $130,000. He testified that the plant had a salvage value of about $175,000; that it had at times accounts receivable of over $40,000; that it had numerous automobiles, and quite an inventory of supplies. When asked what the plant sold for in October, 1919, this witness, who has been employed by the purchaser to make a resale of the plant, answered that he did not know the exact amount but that he had been informed that it was between $95,000 and $120,000. All this testimony is hearsay. It was testified that the books could not be located, and we would be disposed to accept the testimony of this witness but for his painful lack of memory. In testifying as to the sale price of the plant, the exact amount of which he had been told, the maximum and minimum amounts suggested by his faulty memory varied by an amount equal to nearly one-third of the latter guess. No foundation was laid to show that he could testify with any reasonable degree of competency as to the salvage value of the plant. It is not [22] shown that he was either connected with or had even heard of the disposition of such a plant. Besides, there is left out of the picture the value of many assets such as trucks, supplies, and accounts receivable. This witness further testified that he considered his stock worthless as of November 1, 1918. On cross-examination he thus explained this statement:

Q. You treated this stock as having some value, did you?

A. Well, really I did not consider it, to tell you the truth.

Q. You did not consider whether it did or did not have value, did you? A. That is the idea exactly.

The last witness introduced by petitioner was the president of a national bank at Fresno, California. This witness testified that his bank had refused loans to Packing Company; that he had seen statements of that Company and that he had determined that it was not expedient for his bank to lend it money; that he did not remember the exact date the statements were made; that the company had no credit as of November 1, 1918; that he purchased a small amount of the stock at a date not given upon the guaranty of the president of Packing Company to hold him harmless by reason of his purchase; that his bank would not have loaned money on the sole security of the stock; that he did not remember when Packing Company closed down; that he considered his stock worthless within the year 1918; that in his income tax return for that year he deducted the amount invested in the stock as a loss; and that his return was investigated and said loss allowed but that whether such deduction was proper was neither raised nor discussed.

It is to be noted that the last witness furnished no facts to [23] substantiate his opinion. Whether Packing Company was in such a financial condition in 1918 as to justify the witness in taking a deduction for the loss of his investment differs

affairs. He left the employ of the company in September, 1918. This witness placed the liabilities of Packing Company as of a date not shown as between $120,000 and $130,000. He testified that the plant had a salvage value of about $175,000; that it had at times accounts receivable of over $40,000; that it had numerous automobiles, and quite an inventory of supplies. When asked what the plant sold for in October, 1919, this witness, who has been employed by the purchaser to make a resale of the plant, answered that he did not know the exact amount but that he had been informed that it was between $95,000 and $120,000. All this testimony is hearsay. It was testified that the books could not be located, and we would be disposed to accept the testimony of this witness but for his painful lack of memory. In testifying as to the sale price of the plant, the exact amount of which he had been told, the maximum and minimum amounts suggested by his faulty memory varied by an amount equal to nearly one-third of the latter guess. No foundation was laid to show that he could testify with any reasonable degree of competency as to the salvage value of the plant. It is not [22] shown that he was either connected with or had even heard of the disposition of such a plant. Besides, there is left out of the picture the value of many assets such as trucks, supplies, and accounts receivable. This witness further testified that he considered his stock worthless as of November 1, 1918. On cross-examination he thus explained this statement:

Q. You treated this stock as having some value, did you?

A. Well, really I did not consider it, to tell you the truth.

Q. You did not consider whether it did or did not have value, did you? A. That is the idea exactly.

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It is to be noted that the last witness furnished no facts to [23] substantiate his opinion. Whether Packing Company was in such a financial condition in 1918 as to justify the witness in taking a deduction for the loss of his investment differs

from the issue in this case only that in this proceeding the fiscal year involved includes January 1919. The judgment of this banker, while an evidential fact, is of little weight unless sustained by other evidence. The burden rests on petitioner to show by reasonably convincing evidence the fact, if it be a fact, that within its fiscal year ending January 31, 1919, the stock had become worthless. This is a substantive fact which must be proven. The judgment of this banker on this issue cannot be substituted for the judgment of the Board. The banker stated that his opinion was based on certain statements made by Packing Company. These statements no doubt reflected the assets and liabilities of Packing Company and were important and should have been introduced in evidence or, if lost, their contents should have been supplied by parol evidence, in order that the Board might be furnished with the evidence on which this witness based his judgment. No such evidence was introduced. The fact that this witness took a loss in his 1918 return and that such loss was allowed without comment has no bearing on the determination of the question whether such loss in fact occurred. Here respondent has determined otherwise after an investigation in which this issue was raised and discussed. The banker testified that a corporation which showed no earnings would not qualify for a loan and yet we know that many corporations showing no past or present earnings may have assets sufficient to justify a loan. The fact that the banker would make no loans for [24] or on behalf of

the corporation or would not make a loan on the stock of the corporation to be taken as collateral, does not in and of itself convincingly prove that an investment in stock of such a corporation is a total loss. There can be no doubt of the dire financial condition of the Packing Company, but that of itself does not give us enough to say an investment in its stock was a total loss such as we must say in order that petitioner prevail. The banker's testimony would have considerable weight for corroborative purposes, but, as we have pointed out, we do not have basic facts as to which his testimony would be corroborative.

Standing at January 31, 1919, and knowing the corporation had never operated at a profit, that it faced conidtions which justified no hope that it would ever do so, we nevertheless cannot say, with a forced liquidation inevitable, that the common stock represented a total loss. There were assets and liabilities to be taken into account the extent of which as we have indicated on the state of the record is left to conjecture. Conditions as to the value of assets may have changed in the succeeding fiscal year or charges may have been incurred in that period which resulted in the common stockholders receiving nothing on their stock.

The case presented is that of a corporation which was organized in the latter part of 1916 or the early part of 1917, and which constructed its plant in 1917 at a cost so greatly in excess of previous estimates that it absorbed its paid-in capital. In this condition it had no credit early in 1918, and to raise

money to carry on its operations it issued additional capital stock. Here again we are left in the dark. [25] We do not know the amount of this additional capital. We do know, however, that petitioner subscribed for $5,000 par value of the stock and paid for it in March, 1918, and that petitioner's president at the same time subscribed for $20,000 par value of the stock, so that it appears that this early lack of credit was not considered evidence of insolvency. We know that about $300,000 was invested in this plant and other sums, amounts unknown, were invested in other equipment. We know that at some time it held quite a large amount of bills receivable. We know not what was the approximate amount of its liabilities. We know that it operated as late as November 1, 1918. While it operated at a loss, we do not know what that loss was. We are asked by petitioner to hold that as of January 31, 1919, the amount of petitioner's indebtedness, plus its preferred capital stock, exceeded the then value of all its assets by at least the sum of $277,400, the amount of the outstanding common stock. This, on the record before us, we cannot find.

Counsel for petitioner has cited to us many of our decisions where we have allowed a loss prior to actual liquidation. In those cases we had definite information as to the assets and liabilities and surrounding and attendant circumstances justified the holding that future operations or liquidation could not or would not alter the previously sustained loss.

Reviewed by the Board.

Judgment will be entered for respondent.

Now, April 30, 1929, the foregoing findings of fact and opinion certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[26] United States Board of Tax Appeals, Washington.

DOCKET No. 3962.

ROYAL PACKING COMPANY,
Petitioner.

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER OF REDETERMINATION.

Pursuant to the Board's findings of fact and opinion, promulgated October 4, 1928, it is ORDERED and DECIDED: That, upon redetermination, there is a deficiency for the fiscal year ended January 31, 1919, in the amount of $13,194.26.

Entered, Oct. 6, 1928.

(Signed) JOHN B. MILLIKEN,
Member, United States Board of Tax Appeals.

A true copy: Teste.

B. D. GAMBLE.
Clerk U. S. Board of Tax Appeals.

Now, April 30, 1929, the foregoing order of redetermination certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[27] Filed Dec. 26, 1929. U. S. Board of Tax Appeals.

United States Board of Tax Appeals in and for the United States.

DOCKET No. 3962.

ROYAL PACKING COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW.

To the Honorable Members of the Board of Tax Appeals for the United States:

Now comes the petitioner, the Royal Packing Company, a corporation, with its principal office in Los Angeles, California, by Dan J. Chapin, its attorney, and feeling itself aggrieved by the final judgment of your Board entered against it and in favor of the Commissioner of Internal Revenue on the 4th day of October, 1928, which judgment was rendered on a rehearing of the case by mandate of the Appellate Court of the Ninth Circuit, at

which hearing new and additional evidence was submitted by the petitioner.

The sole issue in this controversy is whether common stock of the Universal Packing Company purchased by the petitioner in the amount of $15,000.00 was worthless and of no value at the time it charged it off as a loss in its return for the [28] fiscal year ending January 31, 1919.

The respondent holding that the loss was not a determined loss until the assets were sold during the month of October, 1920. The petitioner alleging that the respondent's holding was in error.

Your Board held in favor of the respondent on the original hearing, and also on the rehearing.

The petitioner hereby prays for a review of your decision and final judgment on the rehearing before and by The United States Circuit Court of Appeals for the Ninth Circuit, and submits the following assignment of errors:

ASSIGNMENT OF ERRORS.

I.

That the United States Board of Tax Appeals erred in not finding in its finding of facts from the evidence the liabilities and salvage value of the plant on November 1, 1918 (a date within the taxable year), of the Universal Packing Company;

II.

That the United States Board of Tax Appeals erred in not finding in its finding of facts that the amount of the indebtedness of the Universal Packing Company plus its preferred capital stock did

not exceed the salvage value of all its assets as of January 31, 1919 (the closing date of the plaintiff in error's taxable year).

III.

That the United States Board of Tax Appeals erred in not finding in its finding of facts that the capital stock of [29] the Universal Packing Company had no loan value on the date it closed its doors November 1, 1918.

IV.

That the United States Board of Tax Appeals erred in not finding in its finding of facts that the Universal Packing Company had no credit at the banks of Fresno, California; was insolvent and forced liquidation inevitable on November 1, 1918, and that it had been a financial failure from the beginning.

V.

That the United States Board of Tax Appeals erred in not entering judgment for the plaintiff in error herein upon the evidence produced before the Board and upon the facts as found by the Board in its finding of facts.

VI.

That the conclusions of law as made by the Board are not supported by the finding of facts

VII.

That the judgment as entered herein is contrary to law;

By reason whereof plaintiff in error prays that the judgment aforesaid may be reversed.

Dated: Los Angeles, California, this 19th day of December, 1928.

DAN J. CHAPIN,
Attorney for Plaintiff in Error.

I hereby certify that the foregoing petition including assignment of errors is made in behalf of the petitioner above named for a review of the decision rendered by your Board, and is in my opinion, and the same now constitutes the petition and errors upon the review prayed for.

DAN J. CHAPIN,
Attorney for Petitioner.

Now, April 30, 1929, the foregoing petition for review certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[30] Lodged, 4–25–29.

Filed Apr. 23, 1929. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 3962.

ROYAL PACKING COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF EVIDENCE.

The following is the statement of evidence in narrative form in the above-entitled cause:

The above-entitled cause came on for hearing before the Honorable John B. Milliken, Member of the United States Board of Tax Appeals, on April 13, 1928, at San Francisco, California. Dan J. Chapin, Esq., appeared for Royal Packing Company, petitioner, and J. Arthur Adams, Esq., and Alva C. Baird, Esq., for C. M. Charest, General Counsel, Bureau of Internal Revenue, appeared for the Commissioner of Internal Revenue, respondent.

TESTIMONY OF LOUIS M. COLE, FOR PETITIONER.

LOUIS M. COLE, called as a witness by and on behalf of petitioner, after being duly sworn, testified as follows:

Direct Examination.

My name is Louis M. Cole and I reside in Los Angeles, California. Since 1916 I have been president of the Royal Packing Company, a company engaged in canning and packing. I own 95 per cent of the stock in that company. I am familiar with the books of my company. I am thoroughly familiar with the elements of bookkeeping and accounting, having been [31] a bookkeeper at one time during my life. We close the books of our company on January 31 of each year, and that was

(Testimony of Louis M. Cole.)

the date upon which we were closing them in the year 1918. I supervise and instruct our bookkeeper as to the entries made on the books. At the close of the fiscal year 1918 I instructed our bookkeeper to charge off an amount of $12,000. At a later date I instructed our bookkeeper to charge off an amount of $3,000 as of January 31, 1919. The $3,000 had been originally charged off on January 31, 1920.

It was stipulated between the parties through their respective attorneys that the $12,000 was charged off on January 31, 1919, and that the $3,000 was charged off on January 31, 1920; that the reversing entry was made in 1924, transferring the $3,000 that was charged off on January 31, 1920, back to January 31, 1919.

I supervise the bookkeeping in the preparation of our income tax returns. I usually discuss the items that we intend to charge off as being worthless, for instance, bad accounts. I take up our questionable items with the one who makes up our return and determine about them. The $12,000 represented a part of the investment in the Universal Packing Company and we concluded that it was entirely worthless. The $12,000 represented a part, while the whole amount that I have in mind was $15,000. The Universal Packing Company was engaged in the meat packing business.

It was stipulated and agreed between the parties through their respective attorneys that the petitioner had purchased the stock of the Universal

(Testimony of Louis M. Cole.)

Packing Company at a cost of $15,000 and that this purchase was subsequent to March 1, 1913.

[32] The amount of the capital stock of the Universal Packing Company was $346,400, which was divided into $69,000 of preferred stock and $277,400 of common stock.

(By the MEMBER.)

Q. That was the amount issued and outstanding during the entire period that you owned the stock and during the years in controversy?

A. Yes.

(By Mr. CHAPIN.)

Q. Did you testify about the amount; was that the amount issued? A. That was the amount issued.

Q. You are not so positive whether that was the amount outstanding at the time? What did you testify about that?

A. No; I am not positive that that was the amount outstanding. That was the amount issued.

The $15,000 that was paid by the check of the Royal Packing Company was for common stock.

I first became familiar with the affairs of the Universal Packing Company in January, 1918. The way I familiarized myself with the affairs of the Universal Packing Company was that a number of the stockholders met at Fresno and I was among that number. The meeting was called for the purpose of presenting to those present the situation regarding the Universal Packing Company. Mr. Hugo Donau, who was president of the Universal Packing Company, and Mr. Benjamin were pres-

(Testimony of Louis M. Cole.)

ent on behalf of that company. The statement was made at that time that all of the capital derived from the sale of stock had been [33] used in the construction of the building and equipment thereof, and there were no funds to go on with. The statement was made at that time that the banks had refused further credit, and to continue the business it would be necessary for the stockholders to take additional stock. The money to be paid for this additional stock was to be used in the operation of the business, as the company had no money at that time to operate the business. At that time I took $20,000 worth of additional stock.

The next that I heard about the condition of the affairs of the Universal Packing Company was of an assessment. That was shortly after June 1, 1918. The amount of this assessment was $14 a share and I think it related to all of the stock, both preferred and common. The Royal Packing Company did not pay this assessment. The next time I heard anything of the financial condition of the Universal Packing Company was in November, when I heard that the plant had closed and the business discontinued. The par value of the common stock was $100.

I do not know of my own knowledge of the liabilities of the Universal Packing Company as of November 1, 1918. We made an attempt to locate the books of the Universal Packing Company. The efforts that we made to locate the books were that in the preparation of the protest, Mr. Carter, who

(Testimony of Louis M. Cole.)

had attended to my income tax work, made an effort to locate the books. His efforts were not successful. [34]

Q. What explanation do you have, Mr. Cole, for not making a charge-off of the $15,000 originally as of January 1, 1919? In other words, why was it that you charged off $3,000 at a later date?

A. I regarded the Universal Packing Company stock as worthless, and I really cannot explain why we only charged off $12,000—possibly to make my own statement to appear a little more favorable.

After the Universal Packing Company closed their doors, namely, on November 1, 1918, we came to the conclusion that the stock was worthless. We based our conclusion upon the fact that the business from the outset had not been a success. The business had continually lost money. Naturally, the fact that the assessment was made had something to do with our opinion and conclusion. At the time this stock was purchased it was put in my name. At a later date it was transferred to the Royal Packing Company. Subsequently it was transferred from the Royal Packing Company to C. J. Walden.

Q. What was the reason for transferring it to C. J. Walden?

A. Well, recognizing that the stock was worthless, I desired to protect the Royal Packing Company from further assessments and further deficiency judgments.

(Testimony of Louis M. Cole.)

Q. Was the stock at all times the property of the Royal Packing Company? A. It was.

Q. And in fact—

A. It was. It was supposed to be the stock of the Royal Packing Company.

Mr. CHAPIN.—All right.

[35] Cross-examination.

I stated that I was the president of the Royal Packing Company and had been president of that company since 1916. I owned 95 per cent of the stock of that corporation, and I testified that I instructed the bookkeeper to charge off a loss of $12,000 on January 31, 1919. I am referring to a part of the investment in the Universal Packing Company stock. I stated that I discussed with the bookkeeper at the end of the fiscal year, namely, January 31 of each year, what amounts should be charged off in part or in whole. On January 31, 1919, I instructed the bookkeeper to charge off on the books $12,000 of the investment of $15,000. I testified that on January 31, 1920, I instructed the bookkeeper again under similar circumstances to charge off the remainder of the investment, namely, $3,000.

Q. Now, what was your explanation for charging off only a part of that investment at January 31, 1919?

A. Well, possibly to make my own affairs look a little bit better.

(Testimony of Louis M. Cole.)

Q. To make your own affairs look a little better. Now, what do you mean by that?

A. So that my statement would appear a little more favorable.

Q. Your statement to whom?

A. To my banks and to the people from which I purchased goods.

At that time, January 31, 1919, the outstanding capital stock of the Royal Packing Company was $100,000. I imagine we had a surplus of approximately $20,000, making a total of $120,000.

[36] So that you thought $3,000 remainder on your books would have an influence with the banking people; was that your thought, Mr. Cole?

A. Yes, sir.

Q. You think that the $3,000, then, would have a material influence on the banks? A. Yes, sir.

Q. $3,000? A. Yes, sir.

Q. You think that would have changed it?

A. Yes, sir.

Q. Is that your explanation for that authorization? A. Yes, sir.

Q. And the failure to charge off the entire amount? A. Yes, sir.

Q. Did you intend to influence the banking people to extend credit?

A. I don't say that—not alone the banking people, but other people with whom I am doing business.

Q. Not alone the banking people, but other people

(Testimony of Louis M. Cole.)

with whom the Royal Packing Company was doing business? A. Yes.

Q. It was for the purpose of influencing them?

A. Yes.

Q. You do not admit that it was for the purpose of misleading those people? A. No; not at all.

[37] Q. What do you mean by that, then, Mr. Cole, that *if* it was your purpose to influence them in dealing with them?

A. My year's business would show a little better than it otherwise would.

Q. What was your custom in regard to charging off other accounts; did you use the same basis?

A. At times; yes.

Q. You had other losses and bad debts in that year, had you not?

Mr. CHAPIN.—We will admit that there were some other items of losses charged off.

In 1924 I authorized the reversal of the entry of $3,000 and had it charged off as of January 31, 1919. The reason I did that was to put it into the year 1919. The condition of our company in 1924 so far as the banks and business people with whom we dealt had not changed, so that the $3,000 difference would not have influenced them.

Q. Then, why did you do it, Mr. Cole?

A. It was done after the examination of the books by the Government tax inspector or the examiner.

Q. After the income tax examiner had made an

(Testimony of Louis M. Cole.)

examination of the books of the Royal Packing Company? A. Yes, sir.

Q. And had disallowed the $12,000 deduction?

A. And suggested a charge back on that statement.

Q. Is it not a fact, Mr. Cole, that the revenue agent allowed this full amount in the fiscal year 1920? A. Yes.

Q. Then, why did he suggest that you make that entry and charge that off in 1919, when he had allowed it in 1920?

A. Because we decided, as I have testified, that the amount was a loss in 1919.

[38] Q. Yes; but the agent, you said, instructed you to make your reversal entry in 1924 and to charge it off in 1919, that being the fiscal year I am speaking of, whereas he allowed it as a deduction in the fiscal year 1920. Did he explain the reason for asking you to do something contrary to his action? A. No.

Q. What explanation did he make? You knew that he was not allowing it in that fiscal year of 1919? A. He stated that he would not.

Q. But you still state that he instructed you to charge it off in the fiscal year 1919?

A. He did not instruct me at all. He suggested it.

Q. He suggested that you make an entry on your books? A. Yes.

Q. Contrary to what he was going to allow?

A. Yes.

(Testimony of Louis M. Cole.)

Q. And without any explanation?

A. No explanation whatever.

Q. And you never asked for any explanation?

A. No.

Q. Is that something unusual in the way in which you transact business, Mr. Cole?

A. I transact business along my own lines in that direction, but this particular case was entirely unusual, as far as I knew. I made the entries as they appeared on the books.

Q. Mr. Cole, I realize that you are a business man, and that is the reason I am questioning you on this transaction, that as a business man you would receive instructions from this revenue agent to charge that off in the year in which he was not allowing it?

[39] A. I did not receive any instructions to do that.

Q. Just what did he tell you, Mr. Cole?

A. I don't recall what he told me. The entry was made at the time.

Q. 1924? A. Yes, sir.

Q. Do you remember what month in 1924?

A. No.

Q. Why do you remember it was 1924, Mr. Cole?

A. On your suggestion. I know the entry is on my books.

Q. Do you know the name of the agent?

A. No, I do not.

Q. You do not? A. No, sir.

Q. Did you talk to him personally, Mr. Cole?

(Testimony of Louis M. Cole.)

A. Yes, sir.

Q. Where was this conversation, Mr. Cole?

A. In my office.

Q. In your office in Los Angeles? A. Yes, sir.

I stated that I instructed the bookkeeper in the preparation of the income tax returns of the Royal Packing Company. It has been my custom to instruct the bookkeeper as to the keeping of the books and also in preparing the returns of the corporation. I imagine that about the middle of January before we closed our books I discussed this charge-off of $12,000 with our bookkeeper. I [40] instructed her to charge off the $12,000, and a year later I instructed her to charge off the remainder, $3,000. I stated that I determined that this stock became worthless when the plant closed in November, 1918. I determined that by virtue of the fact that the plant closed and ceased operations. I determined that the investment in the company in which we owned stock was a loss just because the plant had closed down. I had had quite some little business experience and I mean to state that if I owned stock in a corporation and I heard that the plant had closed down I would take that as a basis for determining that a loss had been sustained on the entire stock. That is my basis, then, for saying that this stock was worthless at that time, because I heard the plant had closed. I used the same basis in determining that the $12,000 was a loss on January 31, 1919. That was my basis. The stock of the Universal Packing Company was origi-

(Testimony of Louis M. Cole.)

nally in my name and transferred to the Royal Packing Company. The stock was then transferred to Mr. J. C. Walden, I think, in June, 1918.

Q. Well, how much of the stock was transferred in June, 1918, to Mr. Walden? A. All of it.

Q. Now, Mr. Cole, are you positive of that?

A. Positive; yes, sir.

Q. Why are you positive of that?

A. Because the stock certificate was made out in Mr. Walden's name for the full amount of 150 shares.

[41] Have you got that stock certificate here, Mr. Cole? A. No.

Q. Mr. Cole, have you got your books here? Have you your ledger and journal here?

A. The ledger sheets are here .

Mr. CHAPIN.—If you will make your statement, I think we will admit what you—

Mr. ADAMS.—I will ask counsel, since it is his suggestion that I make the statement of what I want to prove: Is it not a fact that only $5,000 of the $15,000 of stock was actually transferred in June, 1918, to Mr. Walden?

Mr. CHAPIN.—We will admit this, that the books will show that there was only charged against Mr. Walden $5,000.

Mr. ADAMS.—That the $10,000—

Mr. CHAPIN.—But we will not admit that the stock was not all transferred. We will admit the charge against Mr. Walden was only $5,000 on the books.

(Testimony of Louis M. Cole.)

Mr. ADAMS.—You will admit what the journal entry there shows relative to this $5,000?

Mr. CHAPIN.—Our admission is just this: The whole stock was transferred, that is, the certificate of stock to Mr. Walden, but the books show just this amount, that there was only charged against him on the books $5,000; that is, the books will show only $5,000, and I presume that is the point you want to make.

Mr. ADAMS.—You will agree that the books show that only $5,000 worth of this stock was transferred to Mr. Walden, and that that transfer was made in June, or thereabouts, 1918?

Mr. CHAPIN.—No; we do not admit that the books show that there was any stock transferred to him at all, but there is an account showing a credit against Mr. Walden of $5,000.

[42] Mr. ADAMS.—Will you stipulate that $10,000 is shown on the books as being in the possession and in the hands of the corporation, and that $5,000 was in Mr. Walden's possession?

Mr. CHAPIN.—You had better introduce the books, if you want that.

Mr. ADAMS.—All right; I will now call for your journal showing the entry of that transfer of $5,000 in 1918. I think we could agree if we understood each other.

Mr. CHAPIN.—Possibly I did not make myself clear. The books will show, and I know Mr. Cole will explain it, that in treating this transaction of $15,000, after he had transferred the stock to

(Testimony of Louis M. Cole.)

him, the bookkeeper made an entry there in adjusting it of only $5,000, and the books will show in adjusting this transaction only $5,000, whereas I know what you are getting at is that they should show $15,000 if he actually owned the stock. Do you want the books?

Mr. ADAMS.—I will call for your journal.

Mr. CHAPIN.—All right (producing book).

The book presented to me is the journal of the Royal Packing Company. Referring to page 180 of that book, I find on that page a charge to bills receivable and a credit to investment account. The item is as follows: "Bills receivable, $5,000. To investment account, $5,000." The explanation is: "C. J. Walden, U. P. Company." The "U. P. Company" means the Universal Packing Company.

Q. Does that mean a charge to him of that stock, the transfer of that stock for bills receivable?

A. There never was any note taken for it.

Q. Would that indicate that one was taken?

A. Yes.

Q. It would indicate it? A. Yes.

[43] Referring to the investment account in our ledger, the credit to that account was carried as a credit of the $5,000 of the Universal Packing Company stock. The ledger sheet that I have shows investment in the Universal Packing Company stock of $10,000 and also an item of $5,000. That account does not show any other credits except that $5,000 to which I have referred. That is all it shows.

(Testimony of Louis M. Cole.)

Thereupon there were received in evidence by agreement of the parties ledger sheet of the Royal Packing Company showing the investment account, the profit and loss statement and five checks, which were marked Petitioner's Exhibit 1 and are made a part of this record.

I testified that our books showed in 1918 that $5,000 worth of this stock was transferred to Mr. Walden for his note. I further stated that we did not receive any $5,000 note and that Mr. Walden did not give us any notes. This was so far as our books showed. The reason that the entries were made showing the receipt of the $5,000 note and that there was a misunderstanding or error on the part of the cashier or bookkeeper in making that entry. The entry was made for the full amount; the instructions were for the full amount. The reason that we had an entry on our books showing that Mr. Walden had given the corporation a note for $5,000 was to show the transfer of the stock to him. The purpose of transferring the stock to Mr. Walden was to avoid assessments for the Royal Packing Company or deficiency judgment if the stockholders were sued. My view was that it did not mean a transfer of the liability. The basis for my statement that it would transfer the liability is that [44] I thought it would. I thought that this transfer to Mr. Walden as shown on our books that he had given a note for, that that would transfer the liability of the corporation in case these assessments were made. That is what

(Testimony of Louis M. Cole.)

we did it for. I contend that Mr. Walden never at any time owned stock, but I did not receive any advice to that effect.

Q. So in making the assessment the Royal Packing Company, and you were the president of it, would you contend that Mr. Walden owned the stock? A. We would not pay the assessment.

Q. But you would have contended that at that time Mr. Walden owned the stock?

A. I presume so; yes, sir.

Q. That would have been your contention at that time?

A. Naturally, if the stock was in his name.

Q. And therefore you would have contended that it was his stock. A. Possibly.

Q. Mr. Cole, I think counsel will admit that you testified at the hearings before the United States Board of Tax Appeals on—

Mr. CHAPIN.—What page?

Mr. ADAMS.—I am trying to find the date of the hearing. Do you remember the date when this case was heard?

Mr. CHAPIN.—I did not try the case before. It was in 1926.

Mr. ADAMS.—Your Honor, may I ask the clerk to state when the previous hearing in this case was held?

The MEMBER.—May 6, 1926.

[45] (By Mr. ADAMS.)

Q. You testified in the case on May 6, 1926; you admit that, Mr. Cole, do you not? A. Yes.

(Testimony of Louis M. Cole.)

Q. It was the same case, and there was the same issue involved, was there not? A. Yes.

Q. Now, Mr. Cole, I believe you testified this morning that the Universal Packing Company had an authorized capital stock of $346,400, did you?

A. Yes.

Q. You testified that the preferred stock was $69,000, did you not? A. Yes.

Q. And you testified that the common stock was $277,400, did you not? A. Yes.

Q. Now, Mr. Cole, when did you determine how much capital stock you had outstanding?

A. I learned that this year.

Q. So that the testimony you have given this morning as to what the capitalization was of the various classes of stock, you obtained that information this year; you did not know that as fact prior to this year, did you, Mr. Cole? A. No.

Q. That is the first time it came to your knowledge? A. Yes.

The Universal Packing Company constructed its plant during the latter part of 1917 and it was put in operation the latter part of that year, I think. The plant was a new plant The corporation [46] was formed in 1916, I think. The plant was constructed and completed in the latter part of 1917. The business of the Universal Packing Company was meat packing.

Redirect Examination.

There was no consideration of any kind whatever

(Testimony of Louis M. Cole.)

that came to the company from Mr. Walden for the stock.

Q. Do you know whether or not the common stockholders got anything at all on their stock after this plant was resold in October, 1919?

Mr. ADAMS.—Just a minute. I object, on the ground that there has been no foundation laid for that question. He stated two premises there—

(By Mr. CHAPIN.)

Q. Do you know when this plant was sold?

A. In 1919.

Q. Do you have any information as to, or did you get any returns from the liquidation of these assets on your common stock? A. No.

Q. Did you receive any communication from the company in reference to the result of this liquidation? A. Yes.

Q. What was the information that you received?

A. After all the debts were paid, the preferred stockholders receive one dollar —

Mr. ADAMS.—One minute. Read the question back, please.

(The reporter thereupon read the pending question as above recorded.)

Mr. ADAMS.—There has been no foundation laid for that. The information may be written information.

[47] Mr. CHAPIN.—He testified that there was a letter.

Mr. ADAMS.—I object to his testifying then, your Honor.

(Testimony of Louis M. Cole.)

Mr. CHAPIN.—I am trying to bring out the facts. Just strike that.

(By Mr. CHAPIN.)

Q. Did you receive any other information from anyone in reference to what was received by the stockholders, either common or preferred, on the liquidation of this—

Mr. ADAMS.—Just a minute. That calls for a yes or no answer.

A. Yes.

(By Mr. CHAPIN.)

Q. What was the information that you received?

Mr. ADAMS.—I object, your Honor. There has been no foundation laid for that question.

(By Mr. CHAPIN.)

Q. Whom did you talk to in reference to it?

Mr. ADAMS.—Just a minute. I object to that question. That is leading.

The MEMBER.—Well, he has testified that he did have a conference with other people.

Mr. ADAMS.—He did not say "conference," did he, your Honor?

Mr. CHAPIN.—I asked him who he talked to about it.

Mr. ADAMS.—I beg your pardon.

(By Mr. CHAPIN.)

Q. Did you have such conversations?

A. With some stockholders; yes.

Q. What was the information you received from the stockholders?

(Testimony of Louis M. Cole.)

Mr. ADAMS.—That would be hearsay, and I object to it.

[48] The MEMBER.—I think he may tell what he obtained from them. It may or may not have any great evidentiary value, as to what he got from them, but as to what they told him, it seems to me it is competent for him to testify.

Mr. ADAMS.—What date was this?

(By Mr. CHAPIN.)

Q. What date was this, Mr. Cole?

A. Subsequent to the sale.

Q. On October 1, 1919? A. Yes.

Mr. ADAMS.—Just a moment. Your Honor, I object on the ground that this is subsequent to the event involved here.

The MEMBER.—Well, it may be that they told him something then that shows the status as of January 31, 1919. As I conceive the issue in this case, it is not contended as being determinative that he may have charged off $12,000 or $3,000. The question at issue is when was the loss sustained, regardless of his determination of such a fact. When, in fact, was it sustained? Now, any facts that we may get in are competent to show when this loss was sustained, whether the acquirement of that knowledge was subsequent to January 31, 1919, or prior thereto. It seems to me that that would be competent.

Mr. ADAMS.—Your Honor, this is the position of the Government in this case. If he testified that Jones told him something, the Government will

(Testimony of Louis M. Cole.)

not have a chance to cross-examine Jones, to bring out what basis Jones had for his statement. That is the position we are in now, and I object to his testifying as to what somebody else told him, without bringing that witness here for cross-examination, to find out the basis of that statement.

The MEMBER.—I think if a business man, in the course of the making of his investments, makes inquiry, whomever he makes it from can testify to the inquiry that he made. Now, it may not have any great evidentiary weight, unless counsel should bring not only the person who made the inquiry, but the person who made the response. He may have still further evidence. However, he may testify for what it is worth.

[49] (By Mr. CHAPIN.)

Q. What was the information you received from them, as to what was received by either the common or preferred stockholders?

Mr. ADAMS.—Just a minute. Will you note my exception, your Honor?

The MEMBER.—An exception will be noted.

A. After the debts were paid, the preferred stockholders received one dollar and four mills for each $100 invested in the stock.

Q. And the common stockholders?

A. The common stockholders received nothing.

Q. As to the $3,000 that you subsequently charged back as of January 31, 1919, your statement is that was an error on the part of the bookkeeper?

(Testimony of Louis M. Cole.)

Mr. ADAMS.—I object to that, your Honor. There is no such statement like that in the record.

The MEMBER.—I do not understand the evidence to be such, Mr. Chapin.

Mr. CHAPIN.—I will reframe the question.

(By Mr. CHAPIN.)

Q. In reference to the charge made on the books of the $5,000 in adjusting the action with Walden and the transfer of this stock, was that entry made in accordance with your instructions?

A. It was not.

Q. What was your instruction to the bookkeeper as to that amount? A. To charge the full amount.

Q. Of $15,000? A. Of $15,000.

[50] Recross-examination.

(By Mr. ADAMS.)

Q. Where is the bookkeeper, Mr. Cole?

A. In Los Angeles.

Q. A man or a woman? A. A woman.

Q. Still in the employ of the Royal Packing Company? A. Yes.

Q. In good health? A. I hope so.

Q. She is able to come down here to testify if you should want to bring her, is she?

A. I didn't think it was necessary.

Q. I mean, was she physically able to come?

A. Not very well, and there would have been nobody there to take care of the business if she came.

Q. You misunderstand my question. Was she physically able to come down? A. Yes.

(Testimony of Louis M. Cole.)

Q. She is still working for the Royal Packing Company? A. Yes.

Q. You testified that this plant was sold in October, 1919, I believe? A. Yes, sir.

Q. That is your recollection?

A. That is my knowledge, October, 1919; yes.

Q. That is right. When did you first obtain that information, Mr. Cole?

[51] A. I obtained that at the same time I obtained the information regarding the amount the preferred stockholders received.

Q. You mean this year, you obtained that information? A. No; I did not receive it this year.

Q. Now, when did you receive it? Just answer the question directly, please. A. Back in 1919.

Q. You obtained the information in 1919?

A. Yes.

Q. When the plant was sold? A. Sir?

Q. When the plant was sold? A. Yes.

Q. You knew at that time the plant was sold?

A. Yes.

Q. You are positive of that, are you, Mr. Cole?

A. Yes.

Q. How did you know the plant was sold, Mr. Cole? A. I received a notice.

Q. In what month did you receive the notice, Mr. Cole? A. The latter part of 1919, I think.

Q. You knew at that time, and you have known ever since that the plant was sold in October, 1919; is that correct? A. I think that was the date, yes.

Q. Now, Mr. Cole, in your testimony which is

(Testimony of Louis M. Cole.)

before the Board here, of May 6, 1926, you testified that you did not know when they sold the plant.

[52] Mr. ADAMS.—I have permission of counsel here to use this transcript, your Honor. I am not proceeding without giving him advance notice that we would use it for impeachment purposes or for any other available purpose, on account of the unusual condition under which this case is set down for hearing. Is not that correct, Mr. Chapin?

Mr. CHAPIN.—Yes.

Mr. ADAMS.—I am going to read this extract from the previous record relative to that. This is Government counsel examining.

(Reading from page 40 of the previous record:)

"Q. Are you acquainted with the fact that the Universal Packing Company sold its plant?

"A. Yes."

This is your testimony, Mr. Cole.

"Q. About what time did they sell the plant?

"A. I don't know.

"Q. What years?

"A. I think in 1919, but I never was definitely informed.

"In the fall of 1919?

"A. So I have been told. I don't know beyond that. I don't know what date it was.

"Q. Do you know the amount of stock which the Universal Packing Company had outstanding?

"A. No."

(By Mr. ADAMS.)

Q. At that time you testified you did not know

(Testimony of Louis M. Cole.)

when they sold the plant, Mr. Cole. What explanation have you to make of that, that you remember those transactions now? A. None.

Q. You have no explanation.

[53] Mr. ADAMS.—You admit, Mr. Chapin, that that is the testimony of Mr. Cole given in the former trial? Here is a transcript of it. You filed the transcript with the Circuit Court of Appeals.

Mr. CHAPIN.—Yes; that appears to be his testimony. He testified "In the fall of 1919."

TESTIMONY OF SCOTT CARTER, FOR PETITIONER.

SCOTT CARTER, called as a witness by and on behalf of petitioner, after being duly sworn, testified as follows:

Direct Examination.

My name is Scott Carter. I am in the business of handling income tax matters before the Internal Revenue Bureau. I prepared the protest for the Royal Packing Company that came before the Bureau in reference to a deficiency tax of some $9,000 plus. During the examination that the revenue agent was making of the books of the Royal Packing Company I was present at different times with him when he was preparing the report which forms the basis of this action. Mr. Cole was present on one or two occasions. The other times I was with the revenue agent alone.

(Testimony of Scott Carter.)

Q. Did you hear the revenue agent make any statement about making an entry of $3,000, which is in controversy here, as of January 31, 1919?

A. It was discussed that in the event that they chose to contest the point of allowing these losses to the taxpayer holding that it was a loss in the prior year and the revenue agent holding that the loss should be allowed in the subsequent year, it was discussed that if we chose to take that stand it would be necessary to make a reversing entry of $3,000, such as was made, and I myself took steps to instruct the bookkeeper that the entry, of which the photostatic copy forms a part of the prior record—

[54] Q. The revenue agent did make that statement?

A. I am not able to state positively just what he said, but I discussed it briefly with him, and he concurred in it—either made the suggestion that it would be an advisable thing to make that reversal entry. That is what the entry amounts to.

I made an investigation to locate the books of the Universal Packing Company and was not able to do so.

Cross-examination.

Q. Do you remember to a certainty when he made that statement that you have just testified to?

A. I believe my testimony is not exactly that.

Q. To that effect, though?

A. That it was discussed. I would not—in the name of accuracy, I would not say that the agent

(Testimony of Scott Carter.)

volunteered the statement. I would rather say he just concurred in it and suggested it would be an advisable thing to do.

Q. He told you at that time that he would recommend that it be allowed in the fiscal year 1920?

A. Yes.

Q. You testified that you questioned about this entry being made in the books?

A. Subsequent and as a result of this conversation.

Q. You were responsible for this entry in 1924 being made?

A. It was a suggestion of his. I would not say that I had authority to direct the bookkeeper.

Q. But you did direct it?

A. Yes. Mr. Cole concurred in the interpretation of it.

Q. Did you hear the testimony of Mr. Cole?

A. Yes.

[55] Q. Do you remember what Mr. Cole said as to who directed that? A. In substance, yes.

Q. What did Mr. Cole say?

A. My recollection is that he said he directed it, but I think there is no confliction in the two.

TESTIMONY OF B. A. BENJAMIN, FOR PETITIONER.

B. A. BENJAMIN, called as a witness by and on behalf of petitioner, after being duly sworn, testified as follows:

Direct Examination.

My name is B. A. Benjamin and I was connected with the Universal Packing Company in the year 1917 and in the year 1918. I was connected with it when it started the construction of the plant. I don't know just what date that was. I was vice-president of the corporation and owned $5,000 of its common stock. I was to get a certain salary and then a bonus if it made a profit. I never received any bonus and to my knowledge the company never made a profit. I left the company about September, 1918. I cannot give the date when the company ceased and discontinued business because I think they ceased after I severed my connection with it. I know it was shortly afterwards. It was near the time that I severed my connection with it. Prior to the time of my connection with the Universal Packing Company I was connected with the Cudahy Packing Company for twenty years. Mr. Donau was president of the Universal Packing Company. While I was with the Universal Packing Company it did not have sufficient capital to carry on the business. I know something about [56] its credit at the banks prior to or during the time that I was with it although I had nothing to

(Testimony of B. A. Benjamin.)

do with the financing of the company or with the finances. I was vice-president and director and had charge of the practical department. When the Universal Packing Company negotiated with me to take the position that I occupied, it was clearly understood that I was to have nothing to do with the finances. That was the statement that I made at the time, although I did assist them in financing it. I could not give the exact date that the business ceased and closed. They were operating spasmodically for a great many months, I should say between March and July. The business affairs generally and the financial affairs were discussed with the Board of Directors.

Q. What would you say as to the value of the common stock on November 1, 1918, of the Universal Packing Company?

Mr. ADAMS.—I object, your Honor.

The MEMBER.—I think we should have the foundation laid as to whether he has sufficient information on which to express an opinion.

A. The only information I could give on that point is my own present opinion. I did not figure my stock was worth anything.

(By the MEMBER.)

Q. Why did you come to such a conclusion?

A. I came to that conclusion for the reason that I could see no possible way of making the business a success, on account of the business or conditions at that time.

(Testimony of B. A. Benjamin.)

Q. Why do you say it never could be made a success? Just state that clearly.

A. Yes; I will state that clearly.

[57] Q. What factors entered into such a conclusion?

A. There were a great many factors that entered into the operations which were unexpected; the principal of which was the advance in livestock at the time American went into the war. We figured—all of our bases of schedules were figured on approximate 9 to 10 cents a pound for livestocks, and they advanced to 19. Then, again, we had very severe competition from the large packers. One of them had a branch house in Fresno, and after we started to operate, another one of the large packers—they both had the business prior to that, established a branch there, and they figured that we were trespassing on their territory; so they dropped the prices on all the finished products, and increased the prices on live hogs in our territory. They were drawing a large quantity of their supplies from that territory, that is, live stock products, and it was a very easy matter for them to advance the prices in our territory.

Q. And by their advancing the prices in the manner which you have indicated, together with the aggregate competition which you had, you believed that the company could not operate profitably, from your viewpoint?

A. Yes; that was a factor.

Q. What other factor entered into that?

(Testimony of B. A. Benjamin.)

A. And also the fact that we had difficulty—you see, when we established that branch, we figured that we could do fifty per cent of our business locally, and the other fifty per cent would be done in San Francisco and Los Angeles. We were operating under state inspection—

Q. Let us not go into minute detail.

A. All right.

Q. Not that I do not want you to make a full statement, but if you can be more specific, let us have that. We have now the question of the cost of the commodities. A. Yes.

Q. And the rise in prices, and we have the competition which you stated you encountered. What other factor entered into your mind, if you can state it briefly?

[58] A. San Francisco tried to exclude our merchandise from coming in, and they passed a law to that effect. The packers all got together and tried to keep us out of the San Francisco market. Every time we shipped a car in here they held it up and tried to prevent us from coming into this market, although we were operating under state law, which was far better than the city laws. They used that to try to keep us out of the market. It was the reverse in Los Angeles, though. The principal thing was the advance in live stock and insufficient capital to operate and the competition that I have already talked about.

We had meetings of the Board of Directors at

(Testimony of B. A. Benjamin.)

which these matters were discussed prior to the severence of my connection with the company.

Q. Are there any other matters that you have first hand information about that bear upon the stability or lack of stability of this company?

A. Yes.

Q. That were discussed?

A. I was in touch with the situation at all times.

Q. I beg your pardon?

A. I was in close touch with the situation all the time.

Q. Do you know anything in a general way of the liabilities of this company? A. Yes.

Q. And how they compared—

A. You mean how they compared with what?

Q. Well, in regard to going into debt all the time.

A. Yes; our indebtedness was increasing all the time. We also had difficulty in getting experienced help. We had to get them from the middle part of the United States.

[59] Q. What, in a general way, was the comparison of the liabilities and the assets? I do not want you to give them in figures exactly, but as a director, what was the general proposition that was discussed there, if you know?

A. Well, yes, I know. Of course, that has been long ago, and I am not as familiar as I might be with those figures. I have had no reason to keep in touch with the situation, in any way, but I do know that we owed about somewhere between $120,000 and $130,000 and I know about how much

(Testimony of B. A. Benjamin.)

common stock was sold. I don't know exactly. Of course, I have heard it stated while I was here, the amount, and I know it was somewhere around $275,000 common stock. I know the amount of preferred stock.

(By Mr. CHAPIN.)

Q. Did you know about the cost of the plant?

A. Yes.

Q. What was the approximate cost of the plant, as you recall it now?

A. As I recall it, somewhere in the neighborhood of $300,000. It was supposed to cost $125,000, but it cost $300,000, due to the high cost of materials during the war.

Q. Had there been any disposition on the part of the directors to sell this plant? A. Yes.

Q. Had you had any offers?

A. No offers, but about six or eight different investigators.

Q. These other companies came in? A. Yes.

Q. Do you know why it was that they were not interested? Did they express themselves?

A. No; they did not express themselves.

Q. Did they make any offer at all on the plant?

[60] Q. Was there any chance, in your judgment, for the successful operation of this plant in the condition it was in at the time you left it?

A. There was just one chance. Oh, prior to that?

Q. Yes; prior to that.

A. That was to supply canned meats to the Gov-

(Testimony of B. A. Benjamin.)

ernment for war purposes. There were only two plants in California doing that, and we were thoroughly equipped to do that work, and we negotiated with the Government to secure some of these orders, and they sent Dr. Hicks, who had charge of the Bureau of Animal Industry to California, to look over the plant and see if it complied with all Government specifications, and it did, with the exception of one thing, and that was the connection—he said we did not have a connection with the sewer, because it was built before Government inspection originally.

Q. That was the only chance you think they had?

A. That is the only chance.

Q. And subsequent results put an end to that, did they not?

A. Well, we made an investigation to find out how much it would cost to put this sewer in and connect it up with the City of Fresno. The figures were somewhere between $25,000 and $30,000, and we did not have that amount of money. We tried to get the money, and also sufficient additional capital, which would have been about $50,000, to carry out those plans.

Q. From the efforts that were made by the Board of Directors to sell this plant, do you think there was any chance of disposing of this plant to other packers?

A. Well, we made the effort, but unsuccessfully.

Q. Then, all that would be left of the plant value there would be the salvage value? A. Yes.

(Testimony of B. A. Benjamin.)

Q. At the time it closed? A. Yes.

[61] Q. Do you know what the salvage value of the plant was? A. Yes.

Mr. ADAMS.—I object. He is now talking about a different period of time. This man was not in the employ of the company at the time.

The MEMBER.—He is a practical man. I understood him to say that he has been in the industry for twenty years.

The WITNESS.—Yes.

The MEMBER.—I think he would have a basis for the expression of an opinion as to the salvage value—if he knows.

Mr. ADAMS.—At the date, your Honor.

The MEMBER.—At the time they closed down, at the time he left, and at the time he testified they closed down, on November 1, 1918. I assume there is no controversy as to the date when the company closed.

Mr. CHAPIN.—No; that is agreed to.

Mr. ADAMS.—May I note an exception?

The MEMBER.—Yes.

The WITNESS.—Do you want an idea?

Mr. CHAPIN.—Yes; we do, about the salvage value.

The WITNESS.—I would consider that that plant was worth somewhere in the neighborhood of $175,000.

The MEMBER.—It might have been worth a great deal more.

Mr. CHAPIN.—Well, the forced sale—

(Testimony of B. A. Benjamin.)

The WITNESS.—Well, a forced sale, it would not have brought that amount. The reason I say that is that there were a great many things that you could not take into consideration if the value of $300,000. That was the sprinkler system, an expenditure of $125,000. You could not make very much out of that, because the saving in premium was sufficient to make that difference.

[62] (By Mr. CHAPIN.)

Q. Do you have any opinion as to what it might have brought at a forced sale for cash?

Mr. ADAMS.—I object to that, your Honor. That is not in issue.

The MEMBER.—I think it is competent to have evidence of what this plant might have been worth, what its asset value was. Of course, it would be stronger if you knew what their liabilities were.

A. I figure that could have been sold for $125,000 to $150,000.

(By Mr. CHAPIN.)

Q. Do you know what it was sold for?

A. Yes, sir. Not exactly, but very close.

Q. What was it?

The MEMBER.—Now, as of your own independent knowledge.

The WITNESS.—Yes; I have.

(By Mr. CHAPIN.)

Q. What was it sold for?

A. I don't know the exact amount.

Q. In round figures?

(Testimony of B. A. Benjamin.)

A. I know it was between ninety-five—I think between $95,000 and $120,000. I have been told the exact amount, but I don't recall that now.

Cross-examination.

(Mr. ADAMS.)

Q. When you say it could be sold for between $95,000 and $120,000, you mean just the plant; you do not mean accounts receivable and cash assets?

A. Just the plant.

[63] Q. That is all you know about it?

A. That is all.

Q. You do not know how many thousand dollars worth of equipment they had outside of the plant, on November 1, 1918, do you?

A. Well, I did know, and I don't know whether any of that was disposed of between the time I left and the actual date of liquidation.

Q. You do not know what the property was actually sold for on October 1, 1919, do you?

A. Not the exact amount, but—

Q. I mean the amount. Do you know what the property consisted of on October 1, 1919? I mean of your independent knowledge, not hearsay or what somebody told you.

A. Well, the buyer of the plant was a friend of mine, and he told me.

Q. You got it from what somebody told you, then? A. Yes.

Q. But you do not know personally?

(Testimony of B. A. Benjamin.)

A. No. The buyer told me, because he asked me to sell it for him.

Q. You said about $175,000 in your opinion?

A. $150,000 to $175,000; yes.

Q. And you said this plant cost about $300,000?

A. This is to the best of my knowledge, as far back as it goes; yes.

Q. When was the corporation organized, do you know? A. I think in the latter part of 1916.

Q. When was this plant constructed?

A. During 1917.

[64] Q. It was completed in the latter part?

A. It was completed in the latter part of 1917.

Q. In other words, it was a brand new plant then, was it? A. Yes.

Q. And it cost about $300,000? A. Yes.

Q. You said that the value would be about $175,000? A. Yes.

Q. Did you testify that one of the reasons for the closing of the business was that it was unable to secure employees?

A. Oh, no. Well, that contributed a little.

Q. That contributed partly?

A. That was not the main reason; yes. The main reason I have already stated.

Q. You stated you thought the stock was worthless. When did you first determine that?

A. I don't know when I first determined it. I felt when I left the company, when I resigned, that my stock was worthless at that time.

(Testimony of B. A. Benjamin.)

Q. Had you previous to that date thought the same thing about it?

A. I could gradually see it coming.

Q. When was the first time you thought that?

A. Well, that is a very hard matter for me to answer, when I first thought of it. As I say, I think I could see the handwriting on the wall.

Q. You did not give your stock away, did you?

A. No.

[65] Q. You did not turn it into the company?

A. No.

Q. You were not willing to do that?

A. I never took that into consideration.

Q. You never thought of that?

A. No; I never thought of that.

Q. You treated this stock as having some value, did you?

A. Well, I really did not consider it, to tell you the truth.

Q. You did not consider whether it did or did not have value, did you?

A. That is the idea exactly.

Q. Now, Mr. Benjamin, is it not a fact that the company sold packing on its own credit?

A. Yes, partly, in a general way.

Q. Is it usual to have large accounts receivable?

A. Well, I don't know exactly. I couldn't state. It varied so much in that business, because the collections are made so close to the time of deliveries. I couldn't give you an average, even.

Q. You could not?

(Testimony of B. A. Benjamin.)

A. Because, as I stated before, we were running spasmodically for quite a long period of time, and that varied considerably.

Q. Well, they ran up sometimes to from $40,000 to $100,000, did they not?

A. No; not up to $100,000, I do not think, at any time.

Q. Well, they ran up to $40,000? A. Yes. [66]

Q. You also took notes for some packing goods, did you not? A. Yes; at times we took notes.

Q. The corporation owned some real estate besides this plant, did it not?

A. They owned the real estate, only, I think where the plant was constructed.

Q. Did they own automobiles and trucks?

A. Yes.

Q. They had quite a few of them, had they not?

A. Yes; for a small plant.

Q. They carried quite an inventory of supplies?

A. Yes.

Q. And carried stationery? A. Oh, yes.

Q. And at times they had claims against the railroad companies, too, had they not?

A. Yes; small claims. I don't think they amounted to very much—just in the natural course of business.

Q. And you left the services of this company in what month?

A. I think it was September, 1918, or thereabouts.

(Testimony of B. A. Benjamin.)

Q. I believe you testified that one of the contributing factors to the unsuccessful conduct of this business was that when the corporation was formed in 1917 and built this plant, they thought they could get hogs at 10 cents? A. Yes.

Q. And later they went up to 19 cents?

A. Yes.

[67] Q. Did not the selling prices on the market also increase?

A. Oh, yes. Yes; they did, but it took so much more money to operate, and we did not have the capital.

Q. Did you not testify that it was on account of the war? A. Yes.

Q. The war had been going on when you built the plant?

A. Not when we conceived the idea of building the plant. All of our schedules were laid out before the war started.

Q. But the war was going on when this corporation was organized?

A. The war was going on, but America had not entered the war.

Redirect Examination.

Mr. Donau who was president of the Universal Packing Company was not a practical packer. He did not know anything about that particular business. He was the one that had control of the finances of the company.

TESTIMONY OF W. O. MILLS, FOR PETITIONER.

W. O. MILLS, called as a witness by and on behalf of petitioner, after being duly sworn, testified as follows:

Direct Examination.

My name is W. O. Mills and I reside at Fresno, California. During the years 1917 and 1918 I was engaged in the banking business and was connected with the Union National Bank of Fresno, California. I was president of that bank. The Universal Packing Company was located in our city and it transacted business with our bank. I was personally acquainted with Mr. Donau, who negotiated the transactions [68] with the bank for the Universal Packing Company. I was familiar with the affairs of the company with reference to their credit in Fresno. The Universal Packing Company had no credit with the banks in Fresno on November 1, 1918. Credit had been withheld from the company some time prior to that time. I cannot tell just how long. I owned some stock in the Universal Packing Company, which I had bought from Mr. Donau. At the time I bought the stock from Mr. Donau I had a conversation with him about the affairs of the corporation. He told me they were embarrassed and he knew they were embarrassed. In reference to the purchase of this stock, Mr. Donau gave me his personal guarantee. At that

(Testimony of W. O. Mills.)

time he was trying to secure additional credit at the bank temporarily. I refused him on the part of the bank and did not make him a personal loan. I bought some stock and he gave me a personal guarantee to take it up—an accommodation between him and myself. He did not make good on this guarantee. We considered him broke. He said he was. In stating that he was broke, he was speaking for the company.

Q. From your knowledge and from the standpoint as president of your bank, what would you say as to the value of the common stock of the Universal Packing Company on November 1, 1918?

Mr. ADAMS.—Just a minute. I object to that. He has not shown any qualification to testify as to that.

(By Mr. CHAPIN.)

Q. Did you still own your stock on November 1, 1918? A. Yes, sir.

Q. Did you ever try to dispose of it?

A. I tried to get Mr. Donau to take it up.

[69] Q. And he refused to? A. He couldn't.

Q. In making out your income tax return for the year 1918, how did you handle the amount that you paid for this stock?

Mr. ADAMS.—Just a minute. Your Honor, that is immaterial. As to how he made out his income tax return, I do not think that is a proper question.

Mr. CHAPIN.—I am going to connect it up.

(Testimony of W. O. Mills.)

The MEMBER.—He can state how he considered his investment.

(By Mr. CHAPIN.)

Q. How did you handle it on your income tax return?

A. I considered it as a loss and charged it off.

Q. Do you make your return on the calendar year or the fiscal year? A. December 31, 1918.

Q. Was there ever any investigation ever made of your return by the Internal Revenue Department?

A. Yes, sir.

Q. What disposition did they make of this deduction? A. Allowed it.

Q. Allowed it? A. Yes.

Q. Was the question discussed with them by you?

A. I don't think so. I don't think it was ever discussed.

Q. Or has it ever been raised?

A. If it was, I don't remember now. I don't remember any; I have no recollection of whether that particular item was discussed or not.

[70] Q. On December 31, 1918, you considered your stock worthless? A. Yes.

Q. And had the same condition that established in your mind the worthlessness of this stock continued practically through the year 1918?

A. Well, it started along about the middle of the year some time, because they were negotiating loans and raising money. The bank was familiar with their statement, and refused to extend the credit. We knew that they were financially embarrassed.

(Testimony of W. O. Mills.)

Q. Do you know when they closed their business, when their business ceased?

A. I have no personal recollection. I know it was some time in the latter part of 1918.

Q. Then, at the time you charged it off you considered the stock worthless and had prior to that time, during the year 1918? A. Yes.

(By the MEMBER.)

Q. What factors entered into your mind in determining that your stock was worthless, Mr. Witness?

A. We had the financial statement of the Universal Packing Company, and were familiar with their affairs.

Q. If I had come to your bank endeavoring to secure a loan, and I had collaterial stock of the Universal Packing Company, but had no other financial responsibility save as represented by that security, what would have been your disposition of the request for the loan that I might have applied for? A. We would not have granted a loan.

(By Mr. CHAPIN.)

Q. Did you ever receive any returns on this common stock that you had? A. No, sir.

[71] Cross-examination.

Q. As of what date did you have the financial statement of this company, Mr. Mills?

A. I don't remember the exact date of the financial statement. Whenever they made application for a loan, we required a statement.

(Testimony of W. O. Mills.)

Q. Do you know whether that was in July or June?

A. Mr. Donau was in and out of the bank all the time, always looking for money.

Q. But you do not know when you saw the financial statement?

A. No; but I know I saw enough of it early enough to keep me out of it.

Q. You do not remember the various assets?

A. I know it was along about that time. I don't remember the date that I bought the stock. That was more a personal matter with Mr. Donau than otherwise. We saw enough of the affairs to know that the bank did not want any loan of the Universal Packing Company.

Q. How did you determine that, on whether they were making a profit or whether they were not making a profit?

A. We took the usual banker's attitude, took their statement and analyzed it and analyzed their business.

Q. How do you analyze a statement at a bank?

A. We first took their assets and determined the value.

Q. Do you base that on earnings, or whether they are making a profit or not? A. Partially.

Q. What percentage would you use as a basis for earnings? Suppose it was making no earnings, would you make any loan? A. No, sir.

Q. If it was making ten per cent, would you make a loan?

(Testimony of W. O. Mills.)

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Q. If it was making ten per cent, would you make a loan?

(Testimony of W. O. Mills.)

[72] A. We might if conditions were healthy and the business all right.

Q. But if they were making no profit you would make no loan?

A. No. Their statement showed that they went back from the very beginning.

[73] PETITIONER'S EXHIBIT No. 1.

(See Page 85.)

NGELES, CAL. ACCOUNT NO. _____

61

rent a/c

CREDIT			V		ITEM		DATE		
5	000	—	1		J180		July	18	18
12	000	—	5		J195	Pr L		31	19
3	196	83	0		Bal				
	100	—	6		J215		Sept	23	
	96	83	9		"		Dec	17	
3	000	—	11		J221	Pr L	Jan	31	20
12	000	—			Bal				
12	000	—	5		J257		Feb	1	21
3	000	—	11		J8	as of	Jan	31	191

(Testimony of W. O. Mills.)

[72] A. We might if conditions were healthy and the business all right.

Q. But if they were making no profit you would make no loan?

A. No. Their statement showed that they went back from the very beginning.

[73] PETITIONER'S EXHIBIT No. 1.

(See Page 85.)

SHEET NO. ____

RATING ____

CREDIT LIMIT $

BANK

SUCCEEDS

ROYAL PACKING COMPANY, INC., LOS ANGELES, CAL.

ACCOUNT NO. 1914

NAME Investment a/c

ADDRESS

CITY

61

CHARLES B. HADLEY CO., MANUFACTURERS, LOS ANGELES, CA.

DATE	NUMBER		V	DEBIT	V	BALANCE	V	CREDIT	V	ITEM	DATE
4/2/16 2500.											
9/28/17 2500.											
6/16/17 2500.											
9/10/17 2500.											
Mar 29 18	U.P.Co.	1163	1	1000 —				500 —	1	180	July 18 18
Apr 19	" "	C75	7	500 —				1200 —	5	195 Pd	" 31 19
Dec 7	[illegible]	C83	11	96 83	✓	0 33 33		3196 83	0	Bal	
		1190	7	5000 —	✓						
Jan 13 19		41	3	100 —	✓	1 [illegible]					
	Balance			3196 83			✓	100 —	6	215	Sept 23
Jan 1 20		2116	9	1200 —		3[illegible]	✓	96 83	9	"	Dec 17
						1[illegible]		3000 —	11	221 Pd 2	Jan 31 20
	Balance			1200 —				1200 —		Bal	
								1200 —	5	229	Feb 1 21
Feb 4 22		C63	3	750 —				3000 —	11	98 as of	Jan 31 1917
Apr 17		C85	7	500 —							
Aug 1		C121	11	4750 —							
Oct 10		C145	1	500 —							
Nov 15		C17	7	500 —							
Dec 29		C39	8	50 —							
Feb 14 23		C61	7	500 —							
"		"	8	50 —							
27		C63	1	750 —							
Apr 4		C75	8	50 —							
Aug 11		C87	8	50 —							
Sept 20		C107	8	50 —							
Sept 1		C123	8	50 —							
14	Cash from Corp.	C125	1	25 88							
25		C129	5	1714 12							
X as of Jan 31 1920		98	12	30000 —		35 [illegible]					
Oct 27		C145	11	1750 —							

[75]

Season 1918

Jan. 31–19.

0	Profit & Loss Dr. to Sundries.....		185116 36
0	Advertising		492 83
9	Aprons		20 —
4	Automobile Expense CJW.		972 16
12	" " L. M. C....		920 46
1	Boxes ..... a/c 12339.10		
	Inv 4145.00		8194 10
9	Brokerage		4748 75
5	Building a/c 5%		2250 13
0	Building Maintenance		323 31
11	Cannery Expense.... a/c 3659.31		
	Inv 245.00		3414 31
4	Cans ..... a/c 75657.39		
	Inv 1408.00		74249 39
0	Caps		10 40
7	Charity		1166 85
6	Chile Canners G. G.		100 —
4	Discount		4322 52
12	Drayage		1238 70
x	Freight		5305 87
6	Furniture		120 15

0	Green Chile		11458 07
3	Insurance ..... a/c	2309.27	
	Com.	850.00	
		3159.27	
	Unexp	785.00	2374 27
5	Investment		12000 —
7	Insurance Life		30 —
8	Interest ..... a/c	3741.84	
	accrued	231.65	3973 49
1	Keyes		1 50
6	Knife .....a/c	96.25	
	Inv.	58.00	38 25
0	Labels .....a/c	9075.72	
	Inv.	4897.00	4178 72
0	Label & Box Exp.....a/c	582.53	
	Inv.	117.00	465 53
9	Machinery ..... a/c	54090.98	
	Mot sups.	34.00	15456 98
5	Machinery Rental		300 —
11	Office Expense		54 46

6	Fuel Oil	a/c 3629.56		
		Inv. 18.00	3611	56
x	Oils & Greases	a/c 193.96		
		Inv. 37.00	156	96
3	Oils—Process		9166	64
11	Pacific Mutual Interest		920	—
3	Pay-roll Administrative		11100	—
8	Garden Grove		740	—
12/0	Office		1240	—

SEASON 1919. 221

6	Profit & Loss Dr. To Sundries.....	99878 28	
0	Pay-roll Administrative		7800 —
2	Garden Grove		900 —
4	Office		1345 —
12	Packers		1930 95
7	Peelers		10125 67
8	Supt.		2560 —
8	Time Hands		18198 74
5	Postage		142 70
x	Fresh Pimientos		22926 59
1	Rubbish %		172 45
	% 908.27		
11	Sacks .....Inv. 457.57		450 70
	% 94.75		

5	Salt & Spices .....Inv.	2.75	92 —
		% 662.98	
2	Stationery .....Inv.	355.	307 98
1	Storage Cand Goods		199 88
7	Swells		157 92
x	Soap %		158 —
7	Taxes		3249 58
5	Telephone & Telegraph		497 34
12	Travel Expense		1241 56
x	Tomatoes		2235 66
12	Water		283 85
		% 227.11	
11	Miscel Can'd Goods.....Inv.	220.75	6 36
		1470.00	
6	Life Insurance 1240.00		230 —

	8	Bills Receivable H. V. Wilkins.....			90 —
	11	(Inv. %) Universal Packing Company...			3000 —
	3	Tools			82 11
	3/12	Anticipation			21493 24
					99878 28
31	0	Building % (Permanent %	554 45		
	0	To New Building % 1919.....			554 45
	7	Machinery %.....	6254 37		
	11	To Machinery % 1919.....			4838 72
	x	" " T. P. Lini.....			275 —
	7	Garbage Equipment			394 39
	12 1	Seats			746 26
					6254 37

[77]

July 1924.

12	Profit & Loss .....3000 —		
11	To Investment % as of Jan. 31st 1919.....		3000 —
	To correct original entry wherein an amount of 12000./00 instead of 15-000/00 in stock of Universal Packing Company was written off as a loss at the end of this fiscal period. Data since gathered proves conclusively that this loss was final and definitely determined then and that the amount then available was sufficient only to pay creditors and to allow for a trivial return to the preferred stock holders of but 1% of the original investment.		
12	Investment %.....3000 —		
11	To Profit & Loss as of Jan 31st 1920.....		3000 —
	To correct an error in charging off a residue of 3000/00 in stock of Universal Packing Company carried as an asset in statement of Jan. 31st 1920, whereas it was		

clearly revealed and definitely established that the loss was complete and final and definitely determined prior to Jan 31st 1919 Correcting journal entry has been made to charge off this sum as of Jan 31st 1919 and this entry serves to reverse the original erroneous entry.

United States Dep.

Pay to the order of

PAY $2500 AND 00 CTS

ROYAL PACKING CO

Dollars

TO The Merchants National Bank,

at Los Angeles

PRESIDENT

United States Depositary.

Royal Packing Company

1812 SACRAMENTO ST

No. 1448

UNITED STATES FOOD ADMINISTRATION LICENSE G-30484

Los Angeles, Cal. MAR 2 1918

Pay to the order of

PAY $5000 AND 00 CTS

ROYAL PACKING COMPANY

Dollars

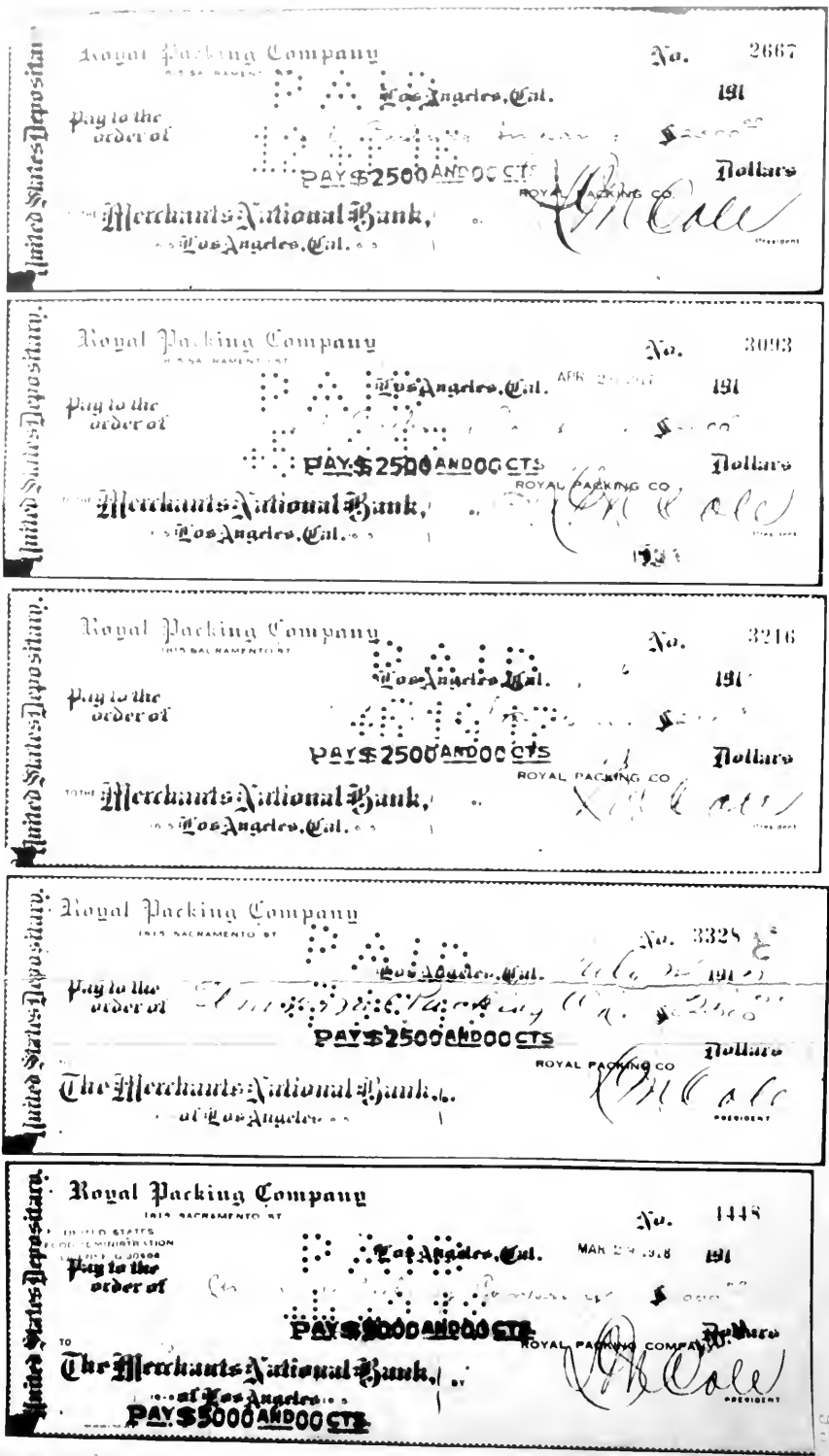
TO The Merchants National Bank,

at Los Angeles

PAY $5000 AND 00 CTS

PRESIDENT

clearly revealed and definitely established that the loss was complete and final and definitely determined prior to Jan 31st 1919 Correcting journal entry has been made to charge off this sum as of Jan 31st 1919 and this entry serves to reverse the original erroneous entry.



Royal Packing Company
1919 SACRAMENTO ST
Los Angeles, Cal.
No. 2667
191
Pay to the order of
PAY $2500 AND 00 CTS
Dollars
ROYAL PACKING CO.
The Merchants National Bank,
Los Angeles, Cal.
President
United States Depositary.

Royal Packing Company
1919 SACRAMENTO ST
Los Angeles, Cal.
No. 3093
191
Pay to the order of
PAY $2500 AND 00 CTS
Dollars
ROYAL PACKING CO.
The Merchants National Bank,
Los Angeles, Cal.
President
United States Depositary.

Royal Packing Company
1919 SACRAMENTO ST
Los Angeles, Cal.
No. 3216
191
Pay to the order of
PAY $2500 AND 00 CTS
Dollars
ROYAL PACKING CO.
The Merchants National Bank,
Los Angeles, Cal.
President
United States Depositary.

Royal Packing Company
1919 SACRAMENTO ST
Los Angeles, Cal.
No. 3328
191
Pay to the order of
PAY $2500 AND 00 CTS
Dollars
ROYAL PACKING CO.
The Merchants National Bank,
of Los Angeles
President
United States Depositary.

Royal Packing Company
1919 SACRAMENTO ST
Los Angeles, Cal.
No. 1448
191
Pay to the order of
PAY $5000 AND 00 CTS
Dollars
ROYAL PACKING COMPANY
The Merchants National Bank,
of Los Angeles
PAY $5000 AND 00 CTS
President
United States Depositary.

Pay to the order of
Farmers National Bank
Fresno
Universal Packing Co
by Hugo J Bonaw Pres.

Universal Pkg Co
by Hugo J Bonaw Pres.

Universal Pkg Co
by Hugo J Bonaw Pres.

Pay to the order of
First National Bank
Fresno
Universal Pkg Co
Hugo J Bonaw Pres.

PAY TO THE ORDER OF
BANK OF ITALY
FRESNO BRANCH
UNIVERSAL PACKING CO.

NO. 10

BANK OF ITALY
SAN FRANCISCO
LOS ANGELES
SEATTLE
PORTLAND

99

[79] The foregoing evidence is all of the material evidence adduced at the hearing before the Board of Tax Appeals and the same is approved by the undersigned as attorney for the Royal Packing Company.

DAN J. CHAPIN.

The foregoing evidence is all of the material evidence adduced at the hearing before the Board of Tax Appeals and the same is approved by C. M. Charest, General Counsel, Bureau of Internal Revenue, as attorney for the Commissioner of Internal Revenue.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

The foregoing is all of the material evidence adduced at the hearing, and in order that the same may be preserved and made a part of this record, this statement of evidence is duly approved and settled this 26th day of April, A. D. 1929.

(Signed) JOHN B. MILLIKEN,
Member, United States Board of Tax Appeals.
M. H.
SSF/bdm.

Now, April 30, 1929, the foregoing statement of evidence certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[80] Filed Mar. 13, 1929. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 3962.

ROYAL PACKING COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S PRAECIPE FOR RECORD.

To the Clerk of said Court:

Sir: Please prepare and certify copy of such papers filed and proceedings had in the above-entitled action as are necessary to a determination of the cause on appeal and in particular as follows:

1. The docket entries of proceedings before the board.
2. Pleadings before your board.
3. Findings of fact, opinion and decision of your board.
4. Petition for review.
5. Statement of evidence as settled or agreed upon.
6. And this praecipe.

DAN J. CHAPIN,
Attorney for Petitioner.

Now, April 30, 1929, the foregoing praecipe certified from the record as a true copy.

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[Endorsed]: No. 5821. United States Circuit Court of Appeals for the Ninth Circuit. Royal Packing Company, a Corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed May 20, 1929.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5821

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ROYAL PACKING COMPANY,
a corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF OF PETITIONER

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Statement of the Case

This is an appeal from a decision of the United States Board of Tax Appeals in favor of the Commissioner of Internal Revenue. In that decision the Board redetermined the deficiency in income and profit taxes for the fiscal year ending January 31, 1919 at $13194.26.

The issue in this proceeding was decided by the Board on October 13, 1926, in favor of the respondent and reported in 5 B. T. A. 55, from which decision an appeal was taken to the Circuit Court of Appeals for the Ninth Circuit. That decision was reversed and the cause remanded for rehearing by the Court; reported in 22 Fed. (2d) 536. On the rehearing the Board rendered a decision adverse to the petitioner.

The questions involved in this appeal from the decision of the Board are:

1. Was the evidence before the Board sufficient to justify a finding that there was no deficiency in tax for the taxable year?

2. Does it reasonably appear from the evidence before the Board that a loss was sustained on the stock in controversy during the taxable year?

Statement of Facts

The petitioner purchased from the Universal Packing Company of Fresno, California, $15,000.00 worth of its capital stock at par during a period from November, 1916, to March, 1918 (Petitioner's Exhibit No. 2, Tr., p. 95). That $12,000.00 of the amount was charged off petitioner's books on January 31, 1919; $3,000.00 charged off January 31, 1920, which entry was reversed in 1924 charging the $3,000.00 as of January 31, 1919, by which entries the books showed that the entire amount of $15,000.00 was charged off as a loss as of January 31, 1919.

The Universal Packing Company was organized and began business in the year 1917 and was engaged in the meat packing business, and on November 1, 1918, its capital stock amounted to the par value of $346,400.00, divided $69,000.00 preferred and $277,400.00 common. The company from the beginning made no profits, and on November 1, 1918, closed its doors and permanently discontinued business. The assets were completely liquidated by the close of October, 1919; the common stockholders receiving nothing on their stock.

The petitioner in its return for income and profits taxes for the fiscal year ending January 31, 1919, deducted the amount of $12,000.00 of the amount paid for the Universal Packing Company stock as a loss and subsequently claimed the additional $3,000.00 paid therefor as a loss sustained in said fiscal year. The respondent disallowed the total amount of $15,000.00 on the grounds that the loss was not sustained in the taxable year.

Points and Authorities

I.

The petitioner did during the taxable year ending January 31, 1919, sustain a loss upon its investment in the stock of the Universal Packing Company within the meaning of the statutes applicable thereto and upon the evidence set forth in the record.

Section 234 (a) (4) *Revenue Act of 1918*, 40 Stat. L. 1078;
Article 141, *Treasury Regulations*, No. 45;
Article 144, *Treasury Regulations*, No. 45;
Article 145, *Treasury Regulations*, No. 45;
Article 561, *Treasury Regulations*, No. 45;
In Re: Harrington, 1 Fed. (2d) 749, 5 Am. Fed. Tax Rep. 5103;
Electric Reduction Co. v. Llewellyn, Collector, 11 Fed. (2d) 493, 5 Am. Fed. Tax Rep. 5897;
S. S. White Dental Mfg. Co. v. U. S., 61 Ct. Cl. 143, 5 Am. Fed. Tax Rep. 5897;
U. S. v. S. S. White Dental Mfg. Co., 47 Sup. Ct. 598, 6 Am. Fed. Tax Rep. 6750;
Royal Packing Co. v. Commissioner, 22 Fed. (2d) 536;
R. Hoe & Co., Inc. v. Commissioner, U. S. Circuit Court of Appeals, 2nd Cir., Feby., 1929;

Prentice Hall Tax Service, paragraph 321;
Corpus Juris., Vol. 23, page 47;
Gould v. Gould, 245 U. S. 151;
Appeal of Midland Coal Co., 1 B. T. A. 311;
Appeal of Egan & Hausman Co., Inc., 1 B. T. A. 556;
Appeal of A. L. Huey, 4 B. T. A. 370;
Appeal of Remington Typewriter Co., 4 B. T. A. 880.

II.

The burden of proof placed upon the petitioner to prove that the loss was sustained in the taxable year in question means that it must introduce sufficient evidence to make a prima facie showing that the Commissioner committed the errors alleged in the petition, and to overcome the proofs submitted on behalf of the Commissioner.

Appeal of J. M. Lyon, 1 B. T. A. 378.

III.

The evidence as disclosed by the record shows that it reasonably appeared that the stock was worthless and the loss was actually sustained in the taxable year in question, and therefore the decision of the Board should be reversed.

Royal Packing Co. v. Commissioner, 22 Fed. (2d) 536.

Errors Relied Upon By the Petitioner

The following particular errors relied upon are set out in the Assignment of Errors (Tr., p. 36):

V. "That the United States Board of Tax Appeals erred in not entering judgment for the

plaintiff in error herein upon the evidence produced before the Board and upon the facts as found by the Board in its finding of facts.

VI. That the conclusions of law as made by the Board are not supported by the finding of facts.

VII. That the judgment as entered herein is contrary to law; By reason whereof plaintiff in error prays that the judgment aforesaid may be reversed."

Among other things the Board found as a fact (Tr. 20-21-22):

" * * * The Universal Packing Company, hereafter referred to as Packing Company, was organized in the latter part of 1916 or the early part of (15) 1917 and was engaged in the meat-packing business at Fresno, California. Its capital stock as of November 1, 1918, amounted to the par value of $346,400, of which $69,000 was preferred stock and $277,400 was common stock. It erected a plant which was completed during the latter part of 1917 at a cost of approximately $300,000. It had been estimated that the cost of this plant would be $125,000. This increase in the cost of the plant exhausted its then paid-in capital. It had no credit with banks. To secure working capital it was determined in January, 1918 at a meeting of the stockholders to issue additional stock. Such stock was issued.

"Petitioner first and last subscribed and paid for $15,000 par value of common stock of Packing Company. The last purchase was made of the additional stock issued pursuant to the action of the stockholders at the meeting held in January or February, 1918. This latter subscription was paid in the amount of $5,000 on March 29, 1918. At the same time, petitioner's president took $20,000 par value of Packing Company stock. Shortly after June 1, 1918, Packing Company made an assessment of $14 per share

on its stockholders, both common and preferred. Petitioner did not pay this assessment. In order to avoid the payment of such an assessment petitioner transferred all its Packing Company stock to C. J. Walden. Entries on petitioner's book indicated that $5,000 par value of the stock was transferred to Walden and that Walden had executed his note to petitioner for that amount. No such note was executed and all the stock was from the date of purchase the property of petitioner.

"Packing Company operated spasmodically during 1918 and from the beginning made no profits. It was not equipped so as to comply with Federal statutes and regulations relative to meat packing. It shut (16) down its plant on November 1, 1918, and never reopened. The plant was sold in October, 1919, and the company thereupon was liquidated. The common stockholders received nothing on their stock.

"On or about January 31, 1919, petitioner's president, who owned 95 per cent of its stock, directed its bookkeeper to charge off as a loss as of January 31, 1919, its stock of Packing Company to the extent of $12,000. Such entry was made. At the direction of the president an entry was made on petitioner's books as of January 31, 1920, charging off the remaining $3,000. In 1924 a revenue agent investigated petitioner's books and tax returns and determined that the whole loss was sustained in the fiscal year ending January 31, 1920, and so informed petitioner's president, who then claimed that the whole loss was sustained in the fiscal year ending January 31, 1919. The revenue agent then indicated that if such claim was to be made, the entry should be changed so as to reflect this contention. Thereupon entries were made which charged the whole loss to the fiscal year ending January 31, 1919. In determining the deficiency for the fiscal year ending January 31, 1919, the respondent refused to allow as a deduction the entire loss claimed."

The Board on this finding of facts found and so decided "Judgment will be entered for respondent." (Tr., p. 33).

The summary of the evidence on which the petitioner relies in support of its contentions is as follows:

LOUIS M. COLE.

The petitioner, through its president, Louis M. Cole, who owned ninety-five per cent of the petitioner's capital stock, purchased from the Universal Packing Company, of Fresno, California, its common stock to the extent of $15,000.00. (Tr., pp. 38, 39, 40.)

The petitioner, in making up its income and excess profits tax return for the fiscal year ending January 31, 1919, took deduction of $12,000.00 as a loss on its investment in the common stock of the Universal Packing Company, which amount, at the direction of the president of the petitioner, was so charged off its books. At a later date, in the year 1924, at the time an investigation was made of petitioner's return for the year in question, the remaining $3,000.00 was charged off the books as of January 31, 1919, the books then showing a total charge off of the entire purchase price of the Universal common stock in the amount of $15,000.00; that in order to make the affairs of the petitioner show better for the close of the fiscal year 1919 the total amount of the investment was not charged off as worthless and taken as a deduction in the first instance. (Tr., p. 39.)

The capital stock of the Universal Packing Company consisted of 690 shares of preferred stock and 2774

shares of common stock at $100.00 par, making a total of $60,000.00 of preferred and $277,400.00 of common. (Tr., p. 40.)

A stockholders' meeting of the Universal Company was held at Fresno, California, in January, 1918, which the witness attended. At this meeting it was learned from Mr. Donau, the president, and Mr. Benjamin, the vice-president of the company that all the capital derived from the sale of stock had been used for the construction and equipment of the building and that no funds were available for operation; that the banks had at this time refused further credit and that it would be necessary for the stockholders to take additional stock in order to continue operations. The witness on behalf of the petitioner took additional stock. (Tr., pp. 40-41.)

On June 1, 1918, the petitioner was notified that an assessment of $14.00 per share had been made against the stockholders of the Universal Company. This assessment the petitioner refused to pay, and in November, 1918 the witness learned that the plant was closed and business discontinued by the Universal Company. (Tr., p. 41.)

The witness, at the time the assessment was made, recognized that the stock was worthless, and for the alleged purpose of protecting the petitioner from further assessments and possible deficiency judgments, the certificate for the 150 shares of the Universal stock was assigned to C. J. Walden, no consideration passed, and the stock in fact was at all times the property of the petitioner. (Tr., pp. 42-43.)

The books of the Universal Company could not be

located after diligent effort was made by the representatives of the witness. (Tr., pp. 41-42.)

The witness testified that the business of the Universal Company from the outset had not been a success and it had continually lost money. (Tr., p. 42.)

The conclusion was reached that the common stock was worthless on November 1, 1918, the date the Universal Company closed its doors and discontinued business. (Tr., p. 48.)

The testimony was further to the effect that the witness learned subsequent to November 1, 1918, in the year 1919, at the time the plant was sold, that the preferred stockholders received $1.004 for each $100.00 invested in stock of the Universal Company, and that the common stockholders received nothing. (Tr., p. 21.)

This testimony was objected to by the respondent's attorney on the ground that it was secured subsequent to the event involved in the case. The member of the Board in passing on the objection made the following statement:

> "The Member: Well, it may be that they told him something then that shows the status as of January 31, 1919. As I conceive the issue in this case, it is not contended as being determinative that he may have charged off $12,000.00 or $3,000.00. The question at issue is when was the loss sustained, regardless of his determination of such a fact. When, in fact, was it sustained. Now, any facts that we may get in are competent to show when this loss was sustained, whether the acquirement of that knowledge was subsequent to January 31, 1919, or prior thereto. It seems to me that that would be competent."

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The counsel in further pressing the ground of his objections, which was to the effect that the testimony to what some one else had told the witness without bringing the witness before the hearing for cross examination to find out the basis of his statement, the member in passing further on the objection made the following statement:

> "The Member: I think if a business man, in the course of the making of his investments, makes inquiry, whomever he makes it from, he can testify to the inquiry that he made. Now, it may not have any great evidentiary weight, unless counsel should bring not only the person who made the inquiry, but the person who made the response. He may have still further evidence. However, he may testify for what it is worth." (Tr., p. 58.)

The cross examination developed that the witness, on a former hearing of the same matter, had testified, that he had never been definitely informed when the plant was sold but that he thought it was in 1919, and that on said hearing he testified that he did not know the amount of stock the company had outstanding, but that he had subsequently learned the amount of preferred and common stock.

SCOTT CARTER.

Scott Carter, tax consultant, testified that the charging back on the books of the petitioner of $3,000.00 as of January 31, 1919 was made under his direction with Mr. Cole's approval, and after he had discussed the matter with the revenue agent that made the investigation of petitioner's returns. He also testified that he made an investigation to locate the books of the Uni-

versal Company but was unable to locate them. (Tr., pp. 62-63.)

B. H. BENJAMIN.

B. H. Benjamin testified that he was vice-president of the Universal Packing Company and owned 50 shares of the common stock at par, total value $5,000.00, and had been connected with the company in that capacity from the time the construction of the plant started until September, 1918, and that the plant discontinued business shortly afterwards; that he had charge of the practical end of the business, and had been for twenty years prior to his connection with this company with the Cudahy Packing Company. He was employed on a salary with a bonus arrangement if the business was run at a profit; that he never received a bonus and that no profit was ever made by the company; that the company operated only spasmodically from March to July before he left the company. (Tr., p. 65.)

The witness testified that he considered his common stock was worth nothing on November 1, 1918; that he came to that conclusion for the reason that he could see no possible way of making the business a success, which was accounted for by the business conditions the company had to meet. The principal factors entering into his conclusion being the advance in price of live stock and insufficient capital to meet competition. (Tr., p. 66.)

He testified that he kept in close touch with the business of the company; that he was present at directors meetings at which time the affairs and condition of the company were discussed; that he knew the company owed between $120,000.00 and $130,000.00; that the cost of

the plant was $300,000.00 when it was supposed to cost $125,000.00; that he knew common stock had been sold in an amount around $275,000.00, and that he knew the amount of preferred stock; that the directors attempted to sell the plant to other companies but had not received any offers; that one last effort was made to secure capital to install a meat canning process which might have saved the plant. It would have taken $50,000.00 additional capital to carry out the plan which could not be secured; that the salvage value of the plant was around $175,000.00, and on forced sale from $125,000.00 to $150,000.00, and that it finally sold for between $95,000.00 and $120,000.00 (Tr., pp. 69-70.)

On cross examination the witness testified that he felt his stock was worthless when he resigned or left the company in September, 1918, and that he did not consider the stock as a factor having value or no value, and that he did not know exactly about the accounts receivable, that they varied so much and because the collections were made so close to the time of deliveries that he could not even give an average; that they did sometimes run up to $40,000.00; that the company took some notes, but owned no real estate other than the plot the plant was constructed on; that the company owned a few automobile trucks and carried an inventory of supplies together with small claims against the railroads. (Tr., pp. 76-77.)

W. O. MILLS.

W. O. Mills testified that he was connected with the Union National Bank of Fresno, California, during the years 1917 and 1918 in the capacity of president, and

that during said time the Universal Packing Company had and conducted business with his bank; that the transactions with the bank were handled by Mr. Donau, president of the packing company; that he, the witness, was familiar with the credit ability of the packing company during said period, and that the company had no credit with the banks of Fresno; that he owned common stock of the packing company to the extent of $2500.00. Mr. Donau, at the time the witness purchased the stock, stated that the company was financially embarassed, but that Mr. Donau personally guaranteed that he would take up the stock; that his bank refused the company any further credit; that subsequently Mr. Donau failed to make good on the guarantee stating that the company was broke, which statements were made on or about November 1, 1918. (Tr., pp. 79-80).

The witness stated that he owned his stock on November 1, 1918; that he tried at this time to get Mr. Donau to take up the stock which he was unable to do; that in making up his income tax return for the calendar year 1918, he deducted the amount he had paid for the stock as a loss, and that the loss was allowed by the Bureau of Internal Revenue, although no investigation had been made of his return so far as the witness remembered; that the witness considered his stock worthless on December 31, 1918; that as early as the middle of the year 1918 he had so considered his stock worthless as at that time the packing company was negotiating loans and raising money; the bank being familiar with the statements of the company refused to extend credit; the bank knowing by the middle of the year 1918 that the company was financially embarassed, and that the

company closed its business sometime in the latter part of 1918, and that he never received any returns from this common stock. (Tr., p. 81-82.)

The witness further testified under questioning by the Board member, as follows:

> "Q. What factors entered in your mind in determining that your stock was worthless, Mr. Witness?
>
> A. We had the financial statement of the Universal Packing Company and were familiar with their affairs.
>
> Q. If I had come to your bank endeavoring to secure a loan, and I had collateral stock of the Universal Packing Company, but had no other financial responsibility, save as represented by that security, what would have been your disposition of the request for the loan that I might have applied for?
>
> A. We would not have granted a loan." (Tr., p. 82.)

On cross examination it was developed from the witness that he examined the statements of the company from which the value of the assets were determined, and that the statements examined showed the packing company went back from the very beginning. (Tr., p. 84.)

ARGUMENT

I.

The petitioner sustained a loss on the stock in question at the close of the taxable year ending January 31, 1919.

The law applicable to losses in Section 234 of the *Revenue Act of 1918* (40 Stat. L. 1078), the part applicable being as follows:

(a) "That in computing the net income of a cor-

poration subject to the tax imposed by Section 230, there shall be allowed as deductions:

(4) Losses sustained during the taxable year and not compensated for by insurance or otherwise."

The Commissioner of Internal Revenue has placed his interpretation on the above section of law by promulgation of articles set forth in regulation as follows:

Article 141 of *Treasury Regulations 45* provides that:

"Losses incurred in the taxpayer's trade or business or in any transaction entered into for profit may be deducted but such losses must usually be evidenced by closed and completed transactions."

Article 151 provides in part:

"Where all the surrounding and attendant circumstances indicate that a debt is worthless and uncollectable and that legal action to enforce payment would in all probability not result in the satisfaction of execution on a judgment, a showing of these facts will be sufficient evidence of the worthlessness of the debt for the purpose of deduction."

Article 144 reads in part as follows:

"If stock of a corporation becomes worthless its cost or its fair market value as of March 1, 1913, if acquired prior thereto, may be deducted by the owner in the taxable year in which the stock became worthless, provided a satisfactory showing of its worthlessness be made as in the case of bad debts."

The above articles are made applicable to corporations by Article 561, *Regulation 45*.

The Circuit Court for the Ninth Circuit in passing upon when losses under this section were sustained, reported in 22 Fed. (2d) 536, said:

"(17) The applicable principles of law are not in controversy, and we content ourselves with little more than a bare statement of them. The taxpayer was not entitled to the deduction merely because the stock may have subsequently become worthless or because, in the light only of subsequent developments, it may appear to have been inherently worthless during the year in question. Nor can the deduction be claimed for a mere shrinkage in value. A loss may be said to be actually sustained in a given year if, within that year, it reasonably appears that such stock has, in fact, become worthless. It is not requisite that there be a charge-off on the books of the taxpayer, and the ultimate fact of worthlessness may be shown by circumstances, as in other cases where that question is in issue. But the burden is on the taxpayer to establish the fact by reasonably convincing evidence. * * * (Here follows numerous citations) * * *."

This expression of the Court is the law of this case, and the burden is therefore upon the petitioner to make out a prima facie case showing that the petitioner had reasonable grounds to believe that it sustained the loss in question at the cose of the taxable year ending January 31, 1919.

The evidence permissible to show when the loss was sustained is not confined to the period before the close of the taxable year, but any facts ascertained whether before or after such time may be availed of for the purpose of substantiating when a given loss was sustained which was held by the Board on the hearing of the case (Tr., p. 57), and in the same ruling further held that it was the entire loss under consideration and when the petitioner might have charged off the $12,000 and $3,000, was not material. Therefore, it will be the contention of the petitioner that the regulations pertinent to the

shrinkage of value of stocks and securities is not applicable to a consideration of the present appeal, or in other words, the petitioner contends the evidence shows a complete loss on the stock at the close of the taxable year.

The question that appears to have controlled the Board largely in its decision was that the evidence failed to show that the common stock of the petitioner was worthless on the date claimed, as the assets and liabilities of the Universal Packing Company were not shown definitely enough by the testimony and that it could not therefore determine the status of the value of stock until complete liquidation which occurred in the year following the taxable year. While it is admitted that if such evidence was available the petitioner should have produced it, yet in this case the books were gone and next best evidence was all that could be produced, and neither do we admit that in order to establish that a loss was sustained it is required to prove the amount of the liabilities or the value of the assets under the expressions of the Board in other cases and the decisions of the courts.

In the appeal of *Egan & Hausman Company, Inc.*, supra, the finding of facts did not disclose the condition of the Bank as to its assets and liabilities; liquidation was not completed during the taxable year. The finding of facts on which the deduction was allowed by the Board appears to have been that the Bank closed its doors during the taxable period and upon the information received by the taxpayer as to the condition of the affairs of the institution.

In its decision the Board said:

> "There is no doubt that from the day the bank closed until November 30 of the same year this

account had absolutely no value. As a financial asset it was then worthless. In adjusting their accounts and debts business men are called upon to use sound business judgment and prudence and are justified in eliminating from their assets such accounts and debts as are past due and which they are satisfied that they can not realize upon within some reasonably determinable period. They do not have to await uncertain and future events, nor are they called upon to wait until some turn of the wheel of fortune may bring their debtors into affluence, or to enable the receivers of a bankrupt institution to eke out a liquidating dividend. We are of the opinion that in this instance the taxpayer exercised sound business judgment in charging off this account and that the same must be allowed as a deduction from gross income for the period within which it was charged off."

A similar situation prevailed as to the finding of facts and conclusion of law as that set forth above in the Egan case, in the appeal of the *Midland Coal Company*, the Board saying:

"The Commissioner contends that if the taxpayer in February and later in 1919 regarded the Cameron Coal Company as worthy of credit for new advances, it could not in good faith have regarded this claim at the end of 1918 as having been worthless on December 31. In this we can not agree. In all the circumstances the taxpayer was justified in regarding the debt as worthless at December 31, 1918 and in writing it off as was done. Subsequently the Cameron Coal Co. suggested to the taxpayer a new venture—the opening of a new pit which might prove economical of operation and might create a source of supply of the product dealt in by the taxpayer and possibly result in a sufficient recovery by the debtor to enable it to pay off part or all of its old indebtedness. The taxpayer was willing to take a chance, but this fact—its willingness subsequent

> to the writing off of the bad debt to risk more good money after bad—does not necessarily prove that the old debt was not bad, nor that it was not written off as such in good faith. We think that the deduction should be allowed."

It will be noted that in the two decisions cited the question is one of the deductibility of bad debts yet, as has been cited, the same satisfactory showing of worthlessness, with reference to losses must be made as in the case of bad debts.

Of the other Board cases cited it appears that—

The appeals of A. L. Huey, Henry M. Jones and Remington Typewriter Company strongly support the contention of the petitioner that he is entitled to the loss in the taxable year in question.

The Courts likewise have held that a loss may be sustained at a time prior to determining the relation between assets and liabilities based upon situations and circumstances which indicate the loss was so sustained as claimed in the case of *In Re Harrington*, supra.

While the facts are not clearly stated it would appear the decision was predicated on the fact the stock was common stock. The company had ceased operation and was insolvent and in bankruptcy yet, the liquidation of the assets had not been completed at the time the loss was taken. This case was an appeal from the decision of the referee, the court saying:

> "I agree with the referee that the bankrupt was entitled to credit in the sum of $10,990.00 in the year 1918 for the cost of common stock in the Altoona Cement Co. Said company was insolvent and had suspended operations prior to July, 1918. The common stock at that time was known to be worthless

> and a satisfactory showing was made of its worthlessness. In such cases it is unnecessary to await the formal determination of the receivership which occurred in 1919."

In the case of the *Electric Reduction Company*, supra, it would appear from the facts as far as recited in the decision that the financial condition of Jouravleff and Hardy, who had guaranteed the loss, were not known until the completion of the litigation some three or four years after the loss was taken by the tax-payer. The Court, however, said:

> "If the $27,205.35 is a loss within the meaning of subdivision (a) (4) it may be deducted from the income of 1918, as it was actually sustained in that year. If it was a bed debt within the meaning of subdivision (a) (5) it may be deducted from the income of that year because it was not ascertained to be worthless and charged off within the taxable year 1918."

The Court held it was a loss, and being so, stated as follows:

> "The loss was sustained in 1918, the taxable year. In that year the money was paid and was never recovered. That the plaintiff was engaged in litigation three or four years in an effort to recover it, and did not charge it off until 1922, does not change the fact nor time of the loss. The entry of the charge off was a mere bookkeeping transaction. It neither created nor changed any fact. It simply recorded the fact which had existed for four years. Baldwin Locomotive Works v. McCoach, 221 F. 59, 60, 136 C. C. A. 660; Doyle, Collector v. Mitchell Bros. Co., 38 S. Ct. 467, 247 U. S. 179, 62 L. Ed. 1054; Gould v. Gould, 38 S. Ct. 53, 245 U. S. 151, 62 L. Ed. 211."

The Court of Claims in deciding the *S. S. White Dental Co. case,* supra, said:

> "The loss sustained by the plaintiff was in our opinion a loss deductible during the calendar year 1918 within the meaning of the statute. Because the plaintiff has a claim which may or may not be paid does not alter the fact that it suffered this loss in the year 1918 and has continued to suffer it down to the present time. The government can not continue indefinitely to hold its taxpayers to account upon the idea that something may happen in the future which will change existing conditions. Losses, which are deductible it is said, 'must be evidenced by closed and completed transactions.' Certainly this transaction was closed and completed in 1918; it remained completed so far as the loss of the plaintiff is concerned. That is surely complete and has continued to be complete from that time to this. In the construction of the statutes common sense must at times be applied, and the facts in this case lead to but one conclusion, which is that the plaintiff suffered such a loss as the statute contemplated when losses were made deductible by its terms."

This decision was affirmed by the United States Supreme Court in the case of *U. S. v. S. S. White Dental Co.* supra. Among other things the Court said:

> "If the seized assets are viewed as the property of respondent, ignoring the entity of the German company, the result is the same. The quoted regulations, consistently with the statute, contemplate that a loss may become complete enough for deduction without the taxpayer's establishing that there is no possibility of an eventual recoupment. It would require a high degree of optimism to discern in the seizure of enemy property by the German Government in 1918 more than a remote hope of ultimate salvage from the wreck of the war. The taxing Act does not require the taxpayer to be an incorrigible optimist.

> "We need not attempt to say what constitutes a closed transaction evidencing loss in other situations. It is enough to justify the deduction here that the transaction causing the loss was completed when the seizure was made. It was none the less a deductible loss then, although later the German Government bound itself to repay and an award was made by the Mixed Claims Commission which may result in a recovery."

The law as set forth by this Court in the *Royal Packing Co. v. Commissioner*, supra, has been cited above.

While facts in cases relied upon by litigants are seldom parallel with the facts in the case up for consideration yet, the principle involved and the general proposition can be determined from the authorities cited, it would appear that all that is required of a taxpayer is to make out a prima facie case based upon such prima facie evidence which is sufficient to establish the fact. And further, that a loss on stock has been sustained in a certain taxable year if it reasonably appears from such prima facie evidence that the stock was worthless in such year.

The worthlessness of stock at a given time may be determined from the situations, circumstances and conditions surrounding the company that issued the stock. If the evidence is available, it is admitted that the best would be; what were the assets worth? What did they bring on liquidation? What were the liabilities and the amount of preferred claims? Yet, it is submitted that under the citations the taxpayer may be allowed a loss if he is convinced from information he receives about the condition of the affairs of the issuing company; from facts within his knowledge, and from the circumstances incident thereto, and from all he has learned if it reason-

ably appears to him that a loss has been sustained he is entitled to the deduction within the year claimed; and the information and facts that he gets subsequent to the year in question is admissible to make out his prima facie case that the loss was sustained at the time claimed.

It will no doubt be urged by the respondent, and which seemed to have influenced the Board to some extent in its decision, that the fact that all the loss was not charged off during the taxable year that there is a question of the shrinkage in the value of the stock; however, on the hearing the Board said it was the time of the loss of the entire $15,000 that was being determined so it would appear that this feature could not be pressed with any effect at this time. The language of the member being as follows:

> "The Member.—Well it may be that they told him something then that shows the status as of January 31, 1919. As I conceive the issue in this case, it is not contended as being determinative that he may have charged off $12,000 or $3,000. The question at issue is when was the loss sustained, regardless of his determination of such a fact. When, in fact, was it sustained? Now, any facts that we may get in are competent to show when this loss was sustained, whether the acquirement of that knowledge was subsequent to January 31, 1919, or prior thereto. It seems to me that that would be competent."

It appears from the testimony of Mr. Cole, the president of the petitioner, that he based his conclusion, that the stock was worthless, at the close of its fiscal year ending January 31, 1919, on grounds as follows:

1. That the business of the Universal Packing Company from the outset had not been a success. The business had continually lost money. (Tr., p. 42).

2. That all the capital derived from the sale of stock had been used in the construction of the building; that the banks had refused further credit, and to continue business it would be necessary for the stockholders to take additional stock. The money to be paid for this additional stock was to be used in the operation of the business as the company had no money at that time to operate the business, and that additional stock was subscribed for by the petitioner. This information was secured at a meeting of the stockholders, at which meeting Mr. Donau, the president, and Mr. Benjamin, the vice-president of the Universal Packing Company were present, and which was held in January, 1918. (Tr., p. 41).

3. That an assessment was levied against the stock of $14 per share during June, 1918. (Tr., p. 41).

4. That the Universal Packing Company closed its doors on November 1, 1918, and business was discontinued. (Tr., p. 41).

From these facts, under the law as laid down by this Court, was the petitioner justified in the conclusion that the stock of the Universal Packing Company was worthless at the close of the taxable year? It is submitted that upon such facts that it did reasonably appear to the petitioner that the stock was worthless at said time. It would seem that we must look first to what "reasonably appears" means and we find that "reasonably" as defined by Webster's Dictionary as "governed by reason, just, rational, not excessive or immoderate. Syn. "Equitably, fairly, moderately," that appear as defined as "coming in sight of, become visible, to be obvious or manifest, to

seem, to look." Syn. "seem." Therefore, from these definitions of the words as used by the Court if it fairly, equitably, and moderately seemed to the petitioner, from the above facts, that it had sustained a loss on the common stock in the Universal Packing Company at the close of the taxable year, it was entitled to the deduction.

We believe that the Board should have considered that the value of common stock depends almost wholly on the earnings of the corporation that issues it, and if its operations cease, due to financial failure, the common stock is left without value, in that such stocks do not participate in the proceeds of liquidation until the claims of creditors and the preferred stock have been fully taken care of.

We, therefore, submit that stock in a company that had lost money from the first; that all of its funds had been exhausted; credit at the bank exhausted; no money to continue operations; confronted with an assessment just after additional stock had been taken, and the doors of the company closed on November 1, 1918, was prima facie evidence that it reasonably appeared to the petitioner that its common stock was worthless when the company closed its doors and ceased business, and that the loss reasonably appeared to have been sustained at such time. However, the petitioner is given further latitude by the decisions cited to establish the time when the loss was sustained, and the witness Cole did subsequently on November 1, 1918, learn that the capital stock of the Universal Packing Company on such date amounted to $346,000, divided $69,000 preferred and $277,000 common; that the plant was sold in October, 1919. The preferred stockholders received $1.004 on each $100.00 of

their investment, and the common stockholders received nothing. The Board refused to find as a fact the amount received by the preferred stockholders on the testimony of the witness on the grounds that it was hearsay, yet it stands in the record undisputed. It did, however, find that the common stockholders received nothing on their stock on liquidation.

It is, therefore, submitted that any information, whether before or subsequent to the year in question is permissible to ascertain when the loss was sustained, that the testimony that the common stockholders received nothing on their stock on liquidation and that the Board so held as a fact, and in that the company never operated after November 1, 1918, that on this evidence of the witness Cole it reasonably appears that the loss was sustained on November 1, 1918, the date the company ceased business and it was a continuing loss from that time to the time of liquidation.

The remaining two witnesses support the conclusion reached by Mr. Cole and stands in the record undisputed.

The petitioner contends that in the absence of the books of the Universal Packing Company which the witness Carter testified could not be found (Tr., p. 63), that Mr. Benjamin, vice-president and director of the company, was in a better position than any one else to know the facts regarding the condition of his company and he testified from his own best memory thereto.

His testimony is that the company was a failure from the start; that it never made a profit (Tr., p. 65), that the indebtedness was from $120,000 to $130,000 (Tr., p. 69); that there was only one chance for the success of the company and money could not be secured to put over

the project (Tr., p. 71); that with this condition confronting him he left the company during September, 1918, and at that time he considered his $5,000 of common stock worthless; that the salvage value of the plant on forced sale was from $125,000 to $150,000 (Tr., p. 73); that bills receivable did not exceed $40,000, and there were some other assets such as auto trucks, supplies, etc. (Tr., p. 77), and that the plant sold for between $95,000 and $120,000 (Tr., p. 74). Taking this testimony as true, which weight should be given to uncontradicted evidence, and approach it as you may and it will show that to the witness it reasonably appeared to him that the loss on his common stock was sustained at the time he left the company in September, 1918.

Great stress appears to have been placed on the statement of the witness to the effect that he gave no consideration to his common stock (Tr., p. 29). It is submitted that his replies are susceptible of another construction, i. e., he so well knew the worthlessness of his stock that he gave it no consideration, and that this construction is the only one that would be in harmony with his other testimony. As said by the Court in the *Electric Reduction Co. v. Llewellyn*, supra:

> "Words do not always mean the same thing. A word is not a crystal transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances in which used." citing Lamar v. U. S. 240 U. S. 60.

So it is a fair inference that under the circumstances the word "considered" as used, he meant the stock was not worthy of consideration. The Board discredited this witness' testimony in part on account of his faulty

memory. It should be noted that ample grounds for a clear recollection on many of the points testified to by the witness is found in the fact of the time that had elapsed since he was connected with the plant; he left in September, 1918, and was testifying in April, 1928, almost ten years after he severed his connection with the company.

The last witness, Mr. Mills, was a banker connected with the Union National Bank, of Fresno, California, during the years 1917 and 1918. He testified that he was familiar with the condition of the Universal Packing Company during this time; that his bank refused credit to the company, and that the company had no credit with the banks of Fresno on November 1, 1918; that Mr. Donau, president of the company, stated the company was broke prior to said date (Tr., pp. 79-80); that he considered his common stock a total loss on December 31, 1918, and charged it off in his income tax return for said calendar year and that the deduction was allowed (Tr., p. 81); that his conclusion determining the loss of the stock was based on financial statements of the Universal Packing Company that he examined (Tr., p. 82).

Therefore the petitioner contends that taking this undisputed evidence as a whole it reasonably appears therefrom that the common stock of the Universal Packing Company was worthless when the company closed its doors on November 1, 1918, and that the loss on the stock was sustained within the taxable year ending January 31, 1919.

II.

The evidence of the three witnesses standing in the record uncontradicted should be given full weight and credit.

The rule appears to be that uncontroverted evidence should ordinarily be taken as true. See *Corpus Juris.*, Volume 23, page 47, and cases cited, wherein it is stated:

> "Uncontroverted evidence should ordinarily be taken as true, citing American Lead Pencil Co. v. Gottlieb, 181 Fed. 178; Barnov v. Schader, 177 Cal. 458; Davis v. Judson, 159 Cal. 121, and many other decisions. And the evidence tends to establish a fact which it is within the power and to the interest of the opposing party to disprove, if false, his failure to attempt to disprove it strengthens the probative force of the evidence tending to prove it."

It is not believed it can be successfully contended that the testimony in the record comes within any of the exceptions that would make the rule inapplicable. It is submitted that under this rule the Board did not give the full weight and credit to the testimony of the three witnesses that it is entitled to thereunder.

The Board in passing on evidence in a case before it which was very much similar to the evidence in the instant case took practically the same view of it as has been done in this case. In the appeal of *R. Hoe & Co.*, 7 B. T. A. 1277, Kelly, a witness, testified among other things:

> "He testified that of his own knowledge, based on his familiarity with the operations of the business, he knew that the expenses and losses of the kind referred to in the two contracts were greater than the $324,000 which was paid. Respondent's motion to strike out this testimony 'upon the ground that

the books are the best evidence and that it rests entirely in the witness' opinion' was granted and an exception allowed to the petitioner." See *Prentice Hall Tax Service*, Paragraph 321, page 285.

What happened in ruling out Kelly's evidence on the grounds the books were the best evidence is in substance what has happened to the testimony in this case. The quality of it has been questioned by inference that better evidence should have been produced.

The Hoe case was appealed to the U. S. Circuit Court of Appeals for the Second Circuit. Decided Feb., 1929. *Prentice Hall Tax Service*, Paragraph 321.

On the question of striking out Kelly's evidence the Court said:

"Moreover, there was proof that the estimated loss was far greater than the amounts allowed by the Navy Department and that the actual loss was also greater. The testimony of the taxpayer's vice-president, who had full charge of the negotiation and of the reconstruction of the plant was to this effect, but it was stricken out on the ground that the books were the best evidence. (Record fol. 151), and that it was only opinion evidence.

"The books contained no separation between the items relating to the cost of reconstruction and those of the other business, so that they might have been of little service had they been before the Board. They were not in themselves primary evidence unless supplemented by the testimony of those making the entries and by proof that the entries were correct. Otherwise they could only be used to refresh recollection in case they serve that purpose. And they were available to the Government if it desired them for cross-examination.

"The objection that the books were the best evidence was clearly insufficient for they were not necessary at all as a part of the taxpayer's proof. Keene

> v. Meade, 3 Peters 1; Forster v. Cutter, 215 Mass. 136; National Ulster County Bank v. Madden, 114 N. Y. 280. The testimony of Kelly was not secondary evidence. Central Commercial Co. v. Jones-Dusenbury Co., 251 Fed. 13. If it was not sufficiently specific the objection should have been taken for that reason so that the taxpayer could elaborate it further. Burton v. Driggs, 20 Wall. 125. The witness was a person who more than anyone else knew the facts and could estimate the expense and loss. We cannot say that his uncontradicted statement that there were expenses greater than the payment made should go for nothing, particularly when it was fortified by the written admission of the parties that the expenses would equal the payments made. If any valid objection could have been made it would really have gone to the insufficiency, rather than to the competency of the evidence. There seems to have been sufficient proof of the ratable deductions to be allocated to the gross income in question under Article 715 of Regulation 45."

It is submitted that in harmony with the ruling of the Court that Kelly's testimony was not secondary evidence. Neither should the evidence of the three witnesses in the instant case be so classed. It is contended the Court properly classified Kelly's testimony by accepting it at its full value and weight, and that the Board was in error in the instant case in not giving to the testimony of the last two witnesses at least, whose evidence was more comparable to that given by Kelly, a weight in accordance with the knowledge each possessed of the particular things which the testimony concerned, which it does not seem was done.

It will be noted that the Board held that practically all of Mr. Benjamin's testimony was hearsay (Tr., p. 28), assuming that when it made this statement the member

referred to his regime of all the evidence that preceded the statement.

It is impossible to reconcile the opinion of the Board as to Mr. Benjamin's evidence with his rulings on his evidence at the hearing as disclosed by the record (Tr., p. 72), wherein the member allowed his testimony on the grounds that he was qualified to testify as to values of the plant at the time it closed down November 1, 1918, and his testimony as to other matters was based on his own personal knowledge. See Tr., p. 69, as to labilities and as to conditions that made the success of the plant impossible (Tr., pp. 66-67).

Under the rule in the Hoe case it appears that Mr. Benjamin's testimony should have been accepted as being conclusive on the things which it concerned. So it is concluded as to the testimony of Mr. Mills, the principle objection asserted against his testimony in the opinion of the Board that it should have been corroborated to have been of value; that the statement of the Universal Packing Company should have been produced or that testimony of their contents should have been made. In answer, it appears if these statements were available it was as incumbent on the respondent to have produced them for the purpose of cross-examination as it was on the petitioner to have produced them, and in their absence and the testimony of the witness standing uncontradicted that he examined them and learned therefrom that the company was broke, it is submitted that the evidence of the witness was more than evidentiary and that under the decision in the Hoe case supra on the Kelly evidence that Mr. Mills' evidence is entitled to full weight and

value as to when the stock was worthless and the loss was sustained.

Under the authorities on uncontroverted evidence as cited, it is believed that the contention of the petitioner that from the evidence of the three witnesses that the Board should have found as a conclusion of law that it reasonably appeared that the loss in question was sustained in the taxable year.

III.

Has the petitioner met the burden of proof as required by Rule 30 of the Board as interpreted by the Lyon appeal supra?

While we must accept the burden of the proof we do not admit the justice of the rule, for it appears that the true rule is that he who makes a claim must assume the burden of the proof. Rule 30 apparently reverses this fundamental rule and thereby shifts the burden, yet, the burden surely can not be imposed beyond a preponderance of the evidence and as held in the Lyon appeal, all that is required is a prima facie case in support of the errors set forth in the petition. A prima facie case is based upon prima facie evidence. The *Cyclopedia Law Dictionary,* page 799 defines prima facie evidence as follows:

> "Prima Facie Evidence such as is in the judgment of law sufficient to establish the fact, and if not rebutted remains sufficient for the purpose."

Measured by this definition it is submitted that the testimony has met the judgment of law which is that from the testimony, "It reasonably appears that the loss was sustained in the taxable year." And when it is

considered that the evidence was not rebutted it becomes sufficient for the purpose of making out the prima facie case.

It is, therefore, submitted that the burden of the proof has been met and that judgment for the petitioner should have been so rendered by the Board.

IV.

Was the Universal Packing Company insolvent at the time it closed its doors on November 1, 1918?

Section 3077, *Civil Code of California* is as follows:

> "What is insolvency of consignee. A person is insolvent, within the meaning of the last section, when he ceases to pay his debts in the manner usual with persons of his business, or when he declares his inability or unwillingness to do so."

Section 3450, *Civil Code of California* is as follows:

> "Insolvency, What. A debtor is insolvent within the meaning of this title, when he is unable to pay his debts from his own means, as they become due."

The evidence shows that the Universal Packing Company, under the provisions of these sections, was insolvent on November 1, 1918; it had liabilities of from $120,000 to $130,000 and no funds from which to pay any part of them and its credit destroyed.

Conclusion

It is respectfully submitted that from the evidence in this case it reasonably appears that the loss was sustained during he taxable year ending January 31, 1919, and that the Board therefore erred in not rendering judgment for the petitioner.

That the finding of facts, "that the Packing Company operated spasmodically during 1918 and from the beginning made no profits. It was not equipped so as to comply with Federal statutes and regulations relative to meat packing. It shut down its plant on November 1, 1918, and never re-opened. The plant was sold in October, 1919, and the company thereupon was liquidated. The common stockholders received nothing on their stock," was sufficient to justify a conclusion of law that the common stock in question was worthless and the loss sustained at the close of the taxable year and that the judgment entered is contrary to law.

WHEREUPON, petitioner respectfully prays that the judgment of the Board be reversed.

Respectfully submitted,

DAN J. CHAPIN,
Attorney for Petitioner.

No. 5821

In the United States Circuit Court of Appeals for the Ninth Circuit

ROYAL PACKING COMPANY, A CORPORATION,
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

UPON PETITION TO REVIEW AN ORDER OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR RESPONDENT

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CITATIONS

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UPON PETITION TO REVIEW AN ORDER OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR RESPONDENT

PREVIOUS OPINIONS

Previous opinions are the opinion of the United States Board of Tax Appeals (5 B. T. A. 55, R. 14–17), reversed by the United States Circuit Court of Appeals for the Ninth Circuit (22 F. (2d) 536), and the opinion of the United States Board of Tax Appeals reported in 13 B. T. A. 773 (R. 19–33).

JURISDICTION

This case involves income and excess-profits taxes for the fiscal year ended July 31, 1919, in the amount of $13,194.26. (R. 33.) The appeal is taken from the final order of redetermination of the Board of Tax Appeals entered October 6, 1928 (R. 33), and the case is brought to this court by

petition to review filed on December 26, 1928, (R. 34), pursuant to the Revenue Act of 1926, c. 27, Sections 1001–1003, 44 Stat. 9, 109, 110.

QUESTION PRESENTED

Did the Board of Tax Appeals err in affirming the determination of the Commissioner of Internal Revenue which disallowed a deduction, claimed by petitioner, of $15,000 representing an alleged loss on the stock of another corporation during the fiscal year ended January 31, 1919?

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1918, c. 18, 40 Stat. 1057:

> SEC. 234. (a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:
>
> * * * * *
>
> (4) Losses sustained during the taxable year and not compensated for by insurance or otherwise;
>
> * * * * *

Treasury Regulations 45 (1920 ed.):

> Art. 144. *Shrinkage in securities and stocks.*—A person possessing securities, such as stocks and bonds, can not deduct from gross income any amount claimed as a loss on account of the shrinkage in value of such securities through fluctuation of the market or otherwise. The loss allowable in such cases is that actually suffered when the securities mature or are disposed

> of. * * *. However, if stock of a corporation becomes worthless, its cost or its fair market value as of March 1, 1913, if acquired prior thereto, may be deducted by the owner in the taxable year in which the stock became worthless, provided a satisfactory showing of its worthlessness be made as in the case of bad debts. * * *.

STATEMENT OF FACTS

The Board of Tax Appeals found the facts to be as follows (R. 20–22):

Petitioner is a corporation organized under the laws of the State of California, with its principal office at Los Angeles, California, and is engaged in the canning and packing business. It keeps its books and makes its income-tax returns on the basis of fiscal years ending on January 31st. During the fiscal year ending January 31, 1919, it had outstanding capital stock in the amount of $100,000 and a surplus of approximately $20,000.

The Universal Packing Company, hereafter referred to as Packing Company, was organized in the latter part of 1916 or the early part of 1917 and was engaged in the meat-packing business at Fresno, California. Its capital stock as of November 1, 1918, amounted to the par value of $346,400, of which $69,000 was preferred stock and $277,400 was common stock. It erected a plant which was completed during the latter part of 1917 at a cost of approximately $300,000. It had been estimated that the cost of this plant would be $125,000. This

increase in the cost of the plant exhausted its then paid-in capital. It had no credit with banks. To secure working capital it was determined in January, 1918 at a meeting of the stockholders to issue additional stock. Such stock was issued.

Petitioner first and last subscribed and paid for $15,000 par value of common stock of Packing Company. The last purchase was made of the additional stock issued pursuant to the action of the stockholders at the meeting held in January or February, 1918. This latter subscription was paid in the amount of $5,000 on March 29, 1918. At the same time petitioner's president took $20,000 par value of Packing Company stock. Shortly after June 1, 1918, Packing Company made an assessment of $14 per share on its stockholders, both common and preferred. Petitioner did not pay this assessment. In order to avoid the payment of such an assessment petitioner transferred all its Packing Company stock to C. J. Walden. Entries on petitioner's books indicated that $5,000 par value of the stock was transferred to Walden and that Walden had executed his note to petitioner for that amount. No such note was executed and all the stock was from the date of purchase the property of petitioner.

Packing Company operated spasmodically during 1918 and from the beginning made no profits. It was not equipped so as to comply with Federal statutes and regulations relative to meat packing.

It shut down its plant on November 1, 1918, and never reopened. The plant was sold in October, 1919, and the company thereupon was liquidated. The common-stock holders received nothing on their stock.

On or about January 31, 1919, petitioner's president, who owned 95 per cent of its stock, directed its bookkeeper to charge off as a loss as of January 31, 1919, its stock of Packing Company to the extent of $12,000. Such entry was made. At the direction of the president an entry was made on petitioner's books as of January 31, 1920, charging off the remaining $3,000. In 1924 a revenue agent investigated petitioner's books and tax returns and determined that the whole loss was sustained in the fiscal year ending January 31, 1920, and so informed petitioner's president, who then claimed that the whole loss was sustained in the fiscal year ending January 31, 1919. The revenue agent then indicated that if such claim was to be made the entry should be changed so as to reflect this contention. Thereupon entries were made which charged the whole loss to the fiscal year ending January 31, 1919. In determining the deficiency for the fiscal year ended January 31, 1919, the respondent refused to allow as a deduction the entire loss claimed.

The sole issue in this proceeding was previously decided by the Board of Tax Appeals adversely to the petitioner on October 13, 1926. (R. 14–17.)

Appeal was taken by petitioner to this court and upon hearing the Board's decision was reversed (22 F. (2d) 536), whereupon the case was remanded for rehearing.

SUMMARY OF ARGUMENT

The decision of the Board of Tax Appeals was based upon an ultimate fact such as in a jury trial the jury would be instructed to find as the basis for its verdict. The question before the Board was whether or not from the evidence adduced it could be held that the common stock of the Universal Packing Company, owned by the petitioner, had become worthless during the fiscal year in question. If the stock was worthless, petitioner was entitled to deduct it as a loss; if not, no deduction was allowable.

The ultimate question being one of fact, this court will not weigh the evidence to determine that question, but will examine the record only to see whether the finding is supported by any substantial evidence. *Royal Packing Company* v. *Commissioner,* 22 F. (2d) 536; *W. K. Henderson Iron Works & Supply Co.,* v. *Blair,* 25 F. (2d) 538; *Avery* v. *Commissioner,* 22 F. (2d) 6; *Ox Fibre Brush Co.* v. *Blair,* 32 F. (2d) 42.

The finding that the stock had not become worthless in the fiscal year in question is amply sustained by the evidence.

ARGUMENT

I

Petitioner seeks here to have the Court reweigh the evidence as to a question of fact, and there being substantial evidence supporting the Board's decision the case presents no question for review

As this case now comes to this court the single question to be decided is whether there was any substantial evidence before the Board of Tax Appeals to support its finding that common stock of the Universal Packing Company owned by petitioner had not become worthless during the fiscal year ending January 31, 1919. The Board's finding was as to an ultimate question of fact such as in a jury trial would have been submitted to the jury as the basis of its verdict. There is no room for contention here that the law has been erroneously applied, for the statute and Regulations clearly define the results which follow the finding of fact. If it reasonably appeared that the stock had become worthless during the fiscal year in question, petitioner was entitled to deduct it as a loss; if not, no deduction was allowable.

In previous consideration of this case it was said by this court (22 F. (2d) 536, 538):

> Questions of fact are exclusively for the Board, except that we may consider whether its findings are supported by any substantial

> evidence. Senate Committee Report 52, Sixty-Ninth Congress, 1st Session, p. 36.

In *Henderson Iron Works* v. *Blair,* 25 F. (2d) 538, the Court of Appeals for the District of Columbia said (p. 539):

> Moreover a decision of the Board of Tax Appeals, when based upon testimony taken at the trial of an issue of fact, should not be reversed by an appellate court because of a difference of opinion as to the mere weight of the evidence.

So also, in *Avery* v. *Commissioner of Internal Revenue,* 22 F. (2d) 6, wherein the taxpayer sought to have reviewed a decision denying a claimed deduction for worthless debts (a question similar to the instant one), the Circuit Court of Appeals for the Fifth Circuit in refusing review, said (p. 8):

> It is a familiar rule that in trials at law, when different conclusions may be drawn by reasonable men from undisputed facts, the question presented is one for the jury. Such is the case before us. We are not at liberty to substitute our opinion for that of the board on the facts shown on the record, even if we were disposed to do so.

Petitioner's contention here amounts to no more than an attempt to have this court reweigh the evidence and substitute its conclusion for that of the Board. This is not sanctioned, for it has been consistently held that the Circuit Courts of Appeals

in reviewing decisions are limited to consideration of questions of law, as on writs of error. *Avery* v. *Commissioner of Internal Revenue, supra; Ox Fibre Brush Co.* v. *Blair* (C. C. A. 4th), 32 F. (2d) 42; *Bishoff* v. *Commissioner of Internal Revenue,* 27 F. (2d) 91.

It is proper for this court to ascertain whether or not there was evidence sustaining the Board's decision, but we submit that the case otherwise presents no question of law for review.

II

THE BOARD'S DECISION IS SUSTAINED BY THE EVIDENCE

It is well settled that the determinations by the Commissioner of Internal Revenue are *prima facie* correct, and the taxpayer who appeals therefrom has the burden of proving that the Commissioner was in error. *United States* v. *Rindskopf,* 105 U. S. 418; *Wickwire* v. *Reinecke,* 275 U. S. 101; *Botany Mills* v. *United States,* 278 U. S. 282. The burden, therefore, was upon the petitioner to establish by reasonably convincing evidence before the Board that the stock here in question had in fact become worthless during the fiscal year ended January 31, 1919. This court so held in its previous consideration of the case. (R. 23.)

In the opinion previously rendered in this case, the then record was described as "so meager, disconnected, and altogether inadequate, as to leave

the ultimate facts largely to conjecture and speculation." (R. 25.) Notice was therefore given to petitioner that in a rehearing before the Board, the deficiencies of the previous record should be corrected if the case were to be maintained. In any attempt to establish the worthlessness of corporate stock at any given time, it would appear fundamental that proof be adduced as to the then assets and liabilities of the company or that its financial condition at such time be otherwise established. This court indicated the requisite character of such proof when in the opinion rendered on previous consideration of the case reference was made to the lack of evidence as to insolvency. (R. 23.) Yet the present record is also lacking in such essential proof.

From the facts found, it is known that about $300,000 was invested in the plant erected by the Universal Packing Company (R. 20, 32), and that other sums of unknown amounts were invested in equipment (R. 32, 74); that sometimes the corporation held quite a large amount of bills receivable running up to at least $40,000 (R. 32, 77); that the company owned automobiles and trucks and carried a substantial inventory of supplies (R. 77). Against these known facts as to assets no specific evidence of the company's liabilities during the period here in question was adduced by petitioner. While it is known that the company operated at a

loss, the amount of that loss was not shown, and the company operated as late as November 1, 1918. (R. 21.) The evidence discloses that petitioner subscribed for $5,000 par value of the stock and paid for it in March, 1918, and that petitioner's president at the same time subscribed for $20,000 par value of the stock. In view of these facts, it would appear that the company's early lack of credit (R. 20) was not considered as late as March, 1918, as evidence of insolvency.

In view of the known assets and the absence of any evidence as to the company's liabilities during the fiscal year here in question, the Board held that on the record presented it could not be found that the amount of the company's indebtedness, plus its preferred capital stock, exceeded the then value of all its assets by at least the sum of $277,400, the amount of the outstanding common stock. (R. 32.)

What testimony was given by petitioner's witnesses has been carefully analyzed in the Board's opinion, and in view of the detailed character of such analysis, it only seems necessary to refer here to that evidence regarded as sustaining the decision reached.

It has been seen that as opposed to the known assets of the company, its liabilities during the period in question were left on the record wholly as a matter of conjecture. The petitioner's action taken with respect to the record value of the stock during

the fiscal year ending January 31, 1919, is strong evidence supporting the Board's decision. Because of the fact that the taxpayer is one who charges off a loss, any facts disclosing his judgment as to such loss at the time at which the loss was claimed, are of great probative value. While it is not contended that a charge-off is necessary to establish a loss or that the taxpayer's then judgment is conclusive, the action taken with respect to the stock during the year for which the loss is claimed is nevertheless here of substantial evidentiary value. The findings of fact disclosed that the taxpayer in closing its books for the taxable year in question charged off only $12,000 of its investment in the common stock of the Universal Packing Company and permitted the balance of $3,000 to remain on its books until the close of the succeeding fiscal year. (R. 21–22.) Both entries were made at the direction of the petitioner's president, who owned 95% of its stock, and who testified that he was a bookkeeper and "thoroughly familiar with the elements of bookkeeping and accounting." (R. 38.) As was pointed out in the Board's opinion (R. 25) the charge on the books made at the president's direction presumably meant more to him, by reason of his bookkeeping experience, than it would to the average business man.

We have also the further significant evidentiary fact that no change was made in the entries until

1924, or more than five years after the date of the first entry. The change then to a claimed loss of the entire $15,000 for the fiscal year ending January 31, 1919, was made only after the revenue agent investigating petitioner's books had indicated that as the entries stood no loss could be allowed for the fiscal year here in question. (R. 22, 26.)

It thus appears that up to 1924 petitioner's books reflected the view that there had been only a shrinkage in value, and that the stock was not worthless in the year in which this case is concerned. Shrinkage in value of securities and stocks will not be permitted as a deduction for a loss sustained. See Article 144 of Regulations 45, *supra*. We do not understand that the petitioner contests that no loss can be claimed for shrinkage in value.

Upon the foregoing facts and the deficiencies of petitioner's proof as analyzed in the Board's opinion, it is submitted that this case presents no question for review by this court. The argument by petitioner is but an appeal to this court to reverse the Board of Tax Appeals on a different view as to the weight of evidence.

CONCLUSION

It is respectfully submitted that the decision of the Board of Tax Appeals should be affirmed by this court on the ground that there is substantial evidence to sustain the finding of the Board that

the stock in question had not become worthless during the fiscal year ending January 31, 1919.

Respectfully,

G. A. YOUNGQUIST,
Assistant Attorney General.
SEWALL KEY,
Special Assistant to the Attorney General.
HARVEY R. GAMBLE,
Special Assistant to the Attorney General.
RANDOLPH C. SHAW,
Special Assistant to the Attorney General.

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue,

J. S. FRANKLIN,
Special Attorney,
Bureau of Internal Revenue,
Of Counsel.

DECEMBER, 1929.

U. S. GOVERNMENT PRINTING OFFICE: 1929

No. 5823

United States

Circuit Court of Appeals

For the Ninth Circuit.

METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, a Corporation,

Appellant,

vs.

MURIEL E. COLTHURST,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

HARRY I. STAFFORD, Esq., and DANIEL R. SHOEMAKER, Esq., Flood Building, San Francisco,

Attorneys for Appellee.

BRONSON, BRONSON & SLAVEN, Esqrs., 111 Sutter Street, San Francisco,

Attorneys for Appellant.

In the United States District Court for the Northern District of California, Southern Division.

No. 18,077.

MURIEL E. COLTHURST,

Plaintiff,

vs.

METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, a Corporation,

Defendant.

AMENDED COMPLAINT ON INDEMNITY INSURANCE POLICY.

Plaintiff complains of defendant and alleges:

1.

That at all times herein mentioned the defendant was and is a corporation duly organized and existing under the laws of the State of New York and

duly authorized and licensed by the laws of the State of California to engage in the automobile indemnity insurance business in the said State of California. That the principal place of business of the defendant in said State of California was and is the City and County of San Francisco.

2.

That at all times herein mentioned and on or about the 15th day of June, 1926, one John Harris was the owner of a certain automobile. That prior to the 15th day of June, 1926, the defendant issued to the said John Harris a policy of automobile indemnity insurance wherein plaintiff is informed and believes and upon such information and belief alleges said defendant agreed to indemnify the said John Harris against any liability not exceeding the sum of Ten Thousand ($10,000) Dollars with taxed Court costs and [1*] interest which should arise against the said John Harris in favor of any person or persons who should sustain any bodily injuries by an accident by reason of the ownership, maintenance or use by said John Harris of said automobile. That the said policy of automobile indemnity insurance so issued as aforesaid by the defendant to the said John Harris was in full force and effect on or about the 15th day of June, 1926.

3.

That plaintiff is informed and believes and upon such information and belief alleges that the said

*Page-number appearing at the foot of page of original certified Transcript of Record.

John Harris has performed all of the conditions of said policy on his part to be performed.

4.

That on or about the 15th day of June, 1926, while plaintiff was riding in said automobile at the request and invitation of said John Harris, and then being operated and controlled by said John Harris along and upon the public highway in the county of Napa, State of California, said John Harris so carelessly, recklessly and negligently drove and operated said automobile that by reason thereof and solely by reason of said John Harris' careless, reckless and negligent management thereof said automobile turned over and plaintiff suffered personal bodily injuries.

5.

That thereafter plaintiff herein commenced and maintained an action in the Superior Court of the State of California, in and for the County of Napa, against the said John Harris for damages for the personal bodily injuries so sustained by her. That said action was numbered [2] 5507 in the records of said Court and that said action was thereafter regularly tried and resulted in a judgment being rendered on or about the 9th day of May, 1927, in favor of said plaintiff and against the said John Harris in the sum of Ten Thousand ($10,000.00) Dollars, together with taxed costs in the sum of Seven ($7.00) Dollars. That said judgment was docketed in the office of the Clerk of the said court on the 17th day of May, 1927, and has become final

and said judgment is now wholly unsatisfied and unpaid.

6.

That on the said 9th day of May, 1927, and at all times since said date the said John Harris was and is insolvent and unable to pay said judgment or any part thereof.

7.

That on the 20th day of September, 1927, said plaintiff had an original writ of execution duly issued out of the Superior Court of the State of California, in and for the county of Napa, and that thereafter said writ of execution so issued by the Court was duly delivered to the sheriff of the county of Napa, State of California, and that in accordance with the terms of said writ of execution the said writ of execution was returned by the said sheriff to said court after the expiration of the time allowed by order of Court for the return of said execution wholly unsatisfied; and that the said judgment in favor of the plaintiff and against John Harris is wholly unsatisfied and no part of the same has been paid. [3]

8.

That prior to the commencement of this action plaintiff demanded of defendant the amount of defendant's liability under and by virtue of the terms of said policy of automobile indemnity insurance and defendant failed and refused and still fails and refuses to pay to plaintiff the amount of said liability or any part thereof. That there is now

due, owing and unpaid from defendant to plaintiff the sum of Ten Thousand ($10,000) Dollars together with taxed costs as aforesaid amounting to Seven ($7.00) Dollars and interest on the sum of Ten Thousand Seven ($10,007) Dollars since the 9th day of May, 1927, no part of which has been paid.

WHEREFORE, plaintiff prays judgment against defendant for the sum of Ten Thousand Seven ($10,007) Dollars with interest on said sum from and after the said 9th day of May, 1927, and for such other relief as to the Court may seem meet and proper in the premises.

HARRY I. STAFFORD,
Attorney for Plaintiff. [4]

State of California,
City and County of San Francisco,—ss.

Harry I. Stafford, being first duly sworn, deposes and says: That he is the attorney for the plaintiff in the above-entitled action; that he has read the foregoing amended complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on information and belief and that as to those matters he believes it to be true.

That the said plaintiff in the above-entitled action is absent from the city and county of San Francisco, State of California, where her attorney has his office and therefore he has sworn on her behalf and makes this affidavit.

HARRY I. STAFFORD.

Subscribed and sworn to before me, this 15th day of March, 1928.

[Seal] EDWARD P. McAULIFFE,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires Dec. 31, 1930.

[Endorsed]: Receipt of a copy of the within amended complaint is hereby admitted this 15th day of March, 1928.

BRONSON, BRONSON & SLAVEN,
Attorneys for Defendant.

Filed Mar. 16, 1928. [5]

[Title of Court and Cause.]

ANSWER OF DEFENDANTS TO AMENDED COMPLAINT.

Now comes the defendant Metropolitan Casualty Insurance Company of New York and answering the amended complaint of plaintiff on file herein admits, denies and alleges:

I.

Defendant has no knowledge, information or belief sufficient to answer the allegation in Paragraph 2 of said amended complaint concerning the ownership by said John Harris of the automobile mentioned therein and therefore and upon that ground denies that at any time mentioned in said amended complaint and/or about the 15th day of June, 1926, said John Harris was the owner of said automobile;

denies that by the policy of insurance referred to in said amended complaint said defendant agreed to indemnify the said John Harris against any liability not exceeding the sum of Ten Thousand ($10,000.00) Dollars with taxed court costs and/or interest which should arise against the said John Harris in favor of any person or persons who should sustain any bodily injuries by an accident by reason of the ownership, maintenance or use by said John Harris of said automobile, and in that respect alleges that [6] the liability of the defendant under said policy was, by the terms of said policy, limited to Five Thousand Dollars ($5,000.00) for injuries to any one person.

II.

Denies that on or about the 15th day of June, 1926, while plaintiff was riding in said automobile at the request and invitation of said John Harris, or at all, and/or while said automobile was being operated and/or controlled by said John Harris along and/or upon the public highway in the county of Napa, State of California, said John Harris so carelessly and/or recklessly and/or negligently drove and/or operated said automobile that by reason thereof and/or solely by reason of said John Harris' careless and/or reckless and/or negligent management thereof, said automobile turned over; further denies that said John Harris was in any way careless and/or reckless and/or negligent in the operation and/or control of said automobile at said time and place; defendant has no knowledge, information or

belief sufficient to answer the allegation of the amended complaint concerning the injuries claimed to have been suffered by plaintiff and therefore, and upon that ground denies that said plaintiff suffered personal bodily injuries.

IV.

Denies that the judgment in the action brought by plaintiff herein against said John Harris in the county of Napa, State of California, which said action is numbered 5507 in the records of said court and is referred to in Paragraph 5 of plaintiff's amended complaint herein, has become final, and in that respect alleges that said judgment was taken by default by reason of the failure of said John Harris to appear therein within the time allotted by law; that thereafter said [7] John Harris moved to set aside said default and that said motion was denied; whereupon, said John Harris perfected an appeal from said order denying said motion to set aside said default, which said appeal is now pending before the Supreme Court of the State of California.

V.

Defendant has no knowledge, information or belief sufficient to answer the allegation in Paragraph 5 of said amended complaint to the effect that the judgment referred to therein is wholly unsatisfied and unpaid and therefore and upon that ground denies that said judgment is now wholly, or in part, unsatisfied and/or unpaid.

VI.

Defendant has no knowledge, information or belief sufficient to answer the allegations of Paragraph 6 of said amended complaint and therefore and upon that ground denies that on said 9th day of May, 1927, and/or at all times since said date, the said John Harris was and/or is insolvent and/or unable to pay said judgment or any part thereof.

VII.

Denies that prior to the commencement of this action plaintiff demanded of defendant the amount of defendant's liability under and by virtue of the terms of said policy of automobile indemnity insurance and in that respect alleges that there is no liability on the part of the defendant under and by virtue of the terms of said policy; denies that there is now due and owing from defendant to plaintiff the sum of Ten Thousand Dollars ($10,000.00), or any other sum; denies that there is now due and owing from defendant to plaintiff taxed costs amounting to Seven Dollars ($7.00), or any other sum; denies that there is now due and owing from defendant [8] to plaintiff interest on the sum of Ten Thousand Seven Dollars ($10,007.00), or upon any other sum, since the 9th day of May, 1927, or since any other time, or at all.

Further answering said amended complaint and as a further, separate and distinct defense this defendant alleges that by the terms of the policy of insurance issued by defendant herein to said John Harris, which said policy is referred to in the amended complaint of plaintiff herein, it is pro-

vided that said insurance and said indemnification is subject to certain conditions stated in said policy; that one of the said conditions is as follows: "Immediate written notice of any accident with the fullest information obtainable at the time must be forwarded to the Home Office of the Company or to its authorized representative. If a claim is made on account of such accident, the Assured shall give like notice thereof, and if suit is brought to enforce such a claim, the Assured shall immediately forward to the Company every summons or other process as soon as same shall have been served on him." That said John Harris, the assured under said policy, failed to perform said condition and failed to comply with said condition, as hereinafter set forth, to wit: That the complaint and summons in said action brought by plaintiff herein against said John Harris in said county of Napa, State of California were served upon said John Harris on or about the 30th day of December, 1926, in the county of San Diego, State of California; that said John Harris failed and neglected until the 12th day of May, 1927, to forward or turn over to defendant herein said complaint and summons and that said John Harris failed and [9] neglected until said 12th day of May, 1927, to notify defendant herein of said service upon him of complaint and summons and that said John Harris failed and neglected until said 12th day of May, 1927, to notify defendant herein of the pendency of said action. By reason of the aforesaid failure and neglect of said John Harris to immediately for-

ward to defendant said complaint and summons, defendant had no knowledge or notice, prior to said 12th day of May, 1927, of said service upon said John Harris of said complaint and summons or of the pendency of said action; that prior to said 12th day of May, 1927, to wit: On or about the 9th day of May, 1927, judgment by default had been rendered in said action against said John Harris and in favor of plaintiff therein; that by reason of the aforesaid failure and neglect of said John Harris to forward to defendant herein said complaint and summons, defendant herein was deprived of an opportunity to defend said action upon its merits; that by reason of the aforesaid breach of the conditions of said policy defendant herein on the 12th day of May, 1927, returned said complaint and summons to said John Harris and on said day served upon said John Harris a written notice to the effect that owing to his failure to forward said complaint and summons as aforesaid, defendant disclaimed all liability under said policy; that defendant has continuously, ever since said 12th day of May, 1927 disclaimed all liability under said policy, and does now disclaim all liability under said policy.

WHEREFORE, defendant prays that plaintiff take nothing by her amended complaint herein and that said defendant be dismissed with its costs herein incurred.

Dated: This 24 day of March, 1928.

BRONSON, BRONSON & SLAVEN,
Attorneys for Defendant. [10]

State of California,
City and County of San Francisco,—ss.

Thomas W. Slaven, being first duly sworn, deposes and says: That he is an attorney at law duly licensed to practice and practicing in all the courts of the State of California; that he has and maintains his office as such attorney in the city and county of San Francisco; that he is one of the attorneys for the defendant; that all of the officers of said defendant corporation are out of the county in which he has and maintains his office and for that reason he makes this verification for and on behalf of said defendant corporation; that he has read the foregoing answer of defendant to amended complaint and knows the contents thereof; that the same is true of his own knowledge except as to those matters therein stated on information and belief and as to those matters he believes it to be true.

THOMAS W. SLAVEN.

Subscribed and sworn to before me this 24th day of March, A. D. 1928.

[Notarial Seal] ETTA LAIDLAW,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Due service and receipt of a copy of the within answer to amended complaint is hereby admitted this 24th day of March, 1928.

HARRY I. STAFFORD,
Attorney for Plaintiff.

Filed Mar. 24, 1928. [11]

(Title of Court and Cause.)

STIPULATION WAIVING JURY.

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that trial by jury of the above-entitled action may be and the same is hereby waived.

Dated: February 15th A. D. 1929.

HARRY I. STAFFORD,
Attorney for Plaintiff.
BRONSON, BRONSON & SLAVEN,
Attorneys for Defendant.

[Endorsed]: Filed Feby. 18, 1929. [12]

In the Southern Division of the United States District Court for the Northern District of California.

No. 18,077.

MURIEL E. COLTHURST,

Plaintiff,

vs.

METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, a Corporation,

Defendant.

JUDGMENT.

This cause having come on regularly for trial on the 20th day of February, 1929, before the Court,

sitting without a jury, a trial by jury having been waived by written stipulation filed; Harry I. Stafford, Esq., and D. R. Shoemaker, Esq., appearing as attorneys for plaintiff, and Roy A. Bronson, Esq., appearing as attorney for defendant, and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the Court after due deliberation having rendered its decision, and ordered that judgment be entered herein in favor of plaintiff and against the defendant for the sum of Five Thousand ($5,000.00) Dollars, together with interest at the rate of 7% per annum from May 9th, 1927, and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that Muriel E. Colthurst, Plaintiff, do have and recover of and from Metropolitan Casualty Insurance Company of New York, a corporation, Defendant, the sum of Five Thousand Six Hundred Sixty-three and 06/100 ($5,663.06) Dollars, together with her costs herein expended taxed at $28.00.

Judgment entered April 1st, 1929.

WALTER B. MALING,
Clerk. [13]

(Title of Court and Cause.)

EXCEPTION TO JUDGMENT AND ORDER ALLOWING SAME.

The defendant above named hereby excepts to

the judgment made and rendered in the above-entitled action on the ground that said judgment is not supported or sustained by the facts in said case as agreed upon between the parties to said action in this, to wit:

That it definitely appears from said agreed facts that John C. Harris, the assured in the policy of insurance sued on herein breached and failed to perform a material condition of said policy, thus rendering said policy void as to him and that the rights of the plaintiff herein under said policy are no greater than those of said assured.

Dated at San Francisco, California, April 19th, A. D. 1929.

BRONSON, BRONSON & SLAVEN,
Attorneys for Defendant.

ORDER.

The above exception is hereby allowed.

Dated at San Francisco, California, April 19th, A. D. 1929.

FRANK H. KERRIGAN,
Judge.

[Endorsed]: Due service and receipt of a copy of the within exception to judgment is hereby admitted this 19th day of April, 1929.

DANIEL R. SHOEMAKER,
HARRY I. STAFFORD,
Attorneys for Plaintiff.

Filed April 19th, 1929. [14]

(Title of Court and Cause.)

STIPULATION (RE AGREED STATEMENT OF FACTS).

IT IS HEREBY STIPULATED by and between the parties in the above-entitled action that the stipulations of counsel at the trial of said action as to the facts in issue in said action and as to proof offered of said facts, all of which said stipulations appear in the reporter's transcript of said trial, shall be deemed and considered to be and were at said trial intended to be an agreed statement of the facts of said action upon which said facts the judgment of the Court herein was to be based and the parties hereto are bound by said stipulations and agreement as to said facts in the same manner as if the same had been reduced to writing in the form of a stipulation and the stipulation had been filed herein prior to the decision of the Court herein.

Dated: This 18th day of April, A. D. 1929, at San Francisco, California.

HARRY I. STAFFORD,
DAN R. SHOEMAKER,
Attorneys for Plaintiff.
BRONSON, BRONSON & SLAVEN,
Attorneys for Defendant.

[Endorsed]: Filed April 19, 1929. [15]

(Title of Court and Cause.)

ORDER EXTENDING TIME TO AND INCLUDING MAY 11, 1929, TO FILE BILL OF EXCEPTIONS.

GOOD CAUSE APPEARING THEREFOR and on application of the defendant in the above-entitled action

IT IS HEREBY ORDERED that the time within which said defendant shall prepare, serve and file its bill of exceptions in the above-entitled action is hereby extended for a period of thirty (30) days from and after April 11th, 1929, to wit: to and including May 11th, 1929.

Dated at San Francisco, California, this 10th day of April, 1929.

FRANK H. KERRIGAN,
Judge.

[Endorsed]: Due service and receipt of a copy of the within order extending time to file bill of exceptions is hereby admitted this 10th day of April, 1929.

HARRY I. STAFFORD,
D. R. SHOEMAKER,
Attorneys for Pltf.

Filed April 10, 1929. [16]

[Title of Court and Cause.]

PROPOSED BILL OF EXCEPTIONS.

BE IT REMEMBERED That the above-entitled cause came on for trial on the 20th day of February, 1929, being one of the days of the November term of said court, before the Honorable Frank H. Kerrigan, one of the Judges of said court, sitting without a jury, a jury having been waived by written stipulation of the parties hereto made and filed in said action.

Harry I. Stafford, Esq., and D. R. Shoemaker, Esq., appeared as attorneys for the plaintiff above named, and Roy A. Bronson, Esq., on behalf of Bronson, Bronson & Slaven, appeared as attorney for the defendant above named.

An opening statement was made by D. R. Shoemaker, Esq., one of the attorneys for the plaintiff. Following this opening statement the facts in said action were stipulated to and agreed upon by counsel for the parties hereto, which said stipulation or agreement as to the facts in said case was recorded by the reporter at said trial and is contained in the said reporter's transcript of said trial. The facts in said action as thus stipulated to and agreed upon are as follows: [17]

That on or about the 15th day of June, 1926, one John Harris was the owner of a certain automobile; that prior to said 15th day of June, 1926, Metropolitan Casualty Insurance Company of New York,

defendant herein, issued to said John Harris in the State of California a policy of automobile indemnity insurance wherein said defendant agreed to indemnify the said John Harris against any liability not exceeding the sum of $5,000.00 with taxed court costs and interest, which should arise against the said John Harris in favor of any person who should sustain any bodily injuries by an accident by reason of the ownership, maintenance or use by said John Harris of said automobile; that the said policy of automobile indemnity insurance was in full force and effect on or about the 15th day of June, 1926.

That on December 3, 1926, an action was commenced by Muriel E. Colthurst, plaintiff herein, against said John Harris in the Superior Court of the State of California in and for the County of Solano for damages for personal bodily injuries alleged by plaintiff to have been sustained by her while she was riding in said automobile on or about said 15th day of June, 1926, at the request and invitation of said John Harris, said automobile then being operated and controlled by said John Harris; that Harry I. Stafford, Esq., acted as attorney for said Muriel E. Colthurst in said action; that summons in said action was served upon said John Harris about the middle of December, 1926, which said summons was forwarded by said John Harris to Metropolitan Casualty Insurance Company of New York, defendant herein; that said Metropolitan Casualty Insurance Company of New York, de-

fendant herein, thereafter engaged the services of Joseph Raines, Esq., an attorney at law of Fairfield, Solano County, California, to conduct the defense of said John Harris in said action and to act as the agent of said Metropolitan Casualty Insurance Company of New York in said action; that said Joseph Raines filed an appearance in said action on behalf [18] of said John Harris by filing a demurrer to plaintiff's complaint therein; that said action was thereafter dismissed by the plaintiff therein; that on or about the 10th day of January, 1927, said Joseph Raines received the following letter from said Harry I. Stafford, Esq.:

Jan. 10, 1927.

"Mr. Joseph M. Raines,
Attorney at Law,
Fairfield, California.

Dear Sir:

I received a copy of your demurrer in the matter of Colthurst v. Harris.

Subsequent to the commencement of the action in Solano County, I commenced an action in Napa County where the accident occurred and accordingly I have dismissed the Solano action and enclose you a copy of the same.

Very truly yours,
HARRY I. STAFFORD."

That the enclosure mentioned in said letter was a copy of the dismissal of the Solano County action.

That following the dismissal of said Solano County action and on or about the 21st day of December,

1926, said Muriel E. Colthurst, plaintiff herein, commenced an action in the Superior Court of the State of California in and for the county of Napa against said John Harris for damages for said personal bodily injuries alleged by her to have been sustained by her while she was riding in said automobile of said John Harris on or about said 15th day of June, 1926, at the request and invitation of said John Harris, said automobile then being operated and controlled by said John Harris; that said action was numbered 5507 in the records of said court; that said John Harris was on the 30th day of December, 1926, personally served with complaint and summons in said action in the county of San Diego, State of California; that said John Harris failed to file an appearance [19] in said action within the time provided by law and by said summons; that the default of said John Harris was on the 3d day of February, 1927, duly taken and entered in said action; that thereafter and on the 9th day of May, 1927, judgment was rendered in said action in favor of said plaintiff and against said John Harris in the sum of $10,000.00, together with taxed costs in the sum of $7.00; that said judgment was docketed in the office of the Clerk of said court on the 17th day of May, 1927, and has become final and said judgment is now wholly unsatisfied and unpaid.

That said John Harris failed and neglected until after judgment had been rendered against him in said action, to wit, until the 12th day of May, 1927, to forward or turn over to said Metropolitan

Casualty Insurance Company of New York, defendant herein, said complaint or summons, and that said John Harris failed and neglected until said 12th day of May, 1927, to notify defendant herein of said service upon him of complaint or summons; that neither said Metropolitan Casualty Insurance Company of New York nor any of its agents or representatives, nor said Joseph Raines, Esq., ever received until said 12th day of May, 1927, said complaint or summons thus served upon said John Harris, or any notice of the service upon said John Harris of said complaint or summons.

That by the terms of said policy of insurance issued by defendant herein to said John Harris, it is provided that said insurance and said policy are subject to certain conditions stated in said policy; that one of said conditions is as follows: [20]

> "Written notice of any accident with the most complete information obtainable at the time must be forwarded to the Home Office of the Company,or to an authorized representative as soon as is reasonably possible. Notice given by or on behalf of the Assured to any authorized agent of the Company with particulars sufficient to identify the Assured shall be deemed to be notice to the Company, and failure to give any notice hereinbefore required shall not invalidate any claim made by the Assured, unless it shall be shown not to have been reasonably possible to give such notice within prescribed time, and that notice thereof, and if suits are brought to enforce such a claim,

the Assured shall immediately forward to the Company every summons, or other process as soon as same shall have been served on him."

Said defendant Metropolitan Casualty Insurance Company of New York on said 12th day of May, 1927, notified said John Harris in writing that he had committed a breach of one of the essential conditions of said policy of insurance, to wit, that he had failed to forward to said Metropolitan Casualty Insurance Company of New York the said complaint or summons served upon him as aforesaid in said action in compliance with the provisions of said policy, and that therefore he had forfeited his rights under said policy, and said Metropolitan Casualty Insurance Company of New York by said notice disclaimed all liability under said policy and has continuously ever since said 12th day of May, 1927, disclaimed all liability under said policy.

That following the judgment taken against said John Harris on said 9th day of May, 1927, in said action brought against him by said Muriel E. Colthurst, said John Harris on his own account and entirely at his own expense engaged the services of said Joseph Raines for the purpose of setting aside the default and judgment entered in said action and for the purpose of acting as his attorney in said action; that acting through his said attorney said John Harris moved to set aside the default and judgment in said action; that on the 12th day of September, 1927, said motion was denied for the

reason that [21] said motion was not passed upon by the Court in said action within a period of six months from the date of judgment in said action; that said Metropolitan Casualty Insurance Company of New York, defendant herein, never participated in said action at any time or in any way, and that the employment of said Joseph Raines by said John Harris in said action was made and done solely by said John Harris on his own behalf and was not made, done or participated in by said Metropolitan Casualty Insurance Company of New York.

The following documentary evidence or exhibits were received in evidence at the trial of said action as a part of said agreed statement of facts:

The judgment-roll of the action brought by said Muriel E. Colthurst against said John Harris in the Superior Court of the State of California in and for the county of Napa; said judgment-roll being marked Plaintiff's Exhibit 1.

The policy of automobile indemnity insurance issued by Metropolitan Casualty Insurance Company of New York, defendant herein, to said John Harris; said policy of insurance being marked Plaintiff's Exhibit 2.

An act of the legislature of the State of California approved May 21, 1919, Statutes 1919, page 776, which said Act reads as follows: [22]

> "*Action against insurance carrier when insured is insolvent. Exhibit of policy.* No policy of insurance against loss or damage resulting

from accident to, or injury suffered by another person and for which the person injured is liable other than a policy of insurance under the workmen's compensation, insurance and safety act of 1917 or any subsequent act on the same subject, or, against loss or damage to property caused by horses or other draught animals or any vehicle, and for which loss or damage the person insured is liable, shall be issued or delivered to any person in this state by any domestic or foreign insurance company, authorized to do business in this state, unless there shall be contained within such policy a provision that the insolvency or bankruptcy of the person insured shall not release the insurance carrier from the payment of damages for injury sustained or loss occasioned during the life of such policy and stating that in case judgment shall be secured against the insured in an action brought by the injured person or his heirs or personal representatives, in case death resulted from the accident, then an action may be brought against the company, on the policy and subject to its terms and limitations, by such injured person, his heirs or personal representatives as the case may be, to recover on said judgment. Upon any proceeding supplementary to execution, the judgment debtor may be required to exhibit any policy carried by him insuring against the loss or damage for which judgment shall have been obtained."

which said Act was introduced in evidence and deemed read.

Upon said trial of the action herein, after said facts as above set forth were agreed upon by counsel for the parties hereto, the case was argued by counsel. Thereafter the said case was submitted to the above-entitled court upon said argument and upon written briefs which were filed by the parties hereto.

Thereafter and on the first day of April, 1929, the above-entitled court rendered its judgment herein in favor of plaintiff and against defendant in the sum of $5,000.00, together with interest thereon at the rate of 7% from the 9th day of May, 1927, and costs of suit, which said judgment was on said 1st day of April, 1929, entered by the Clerk of said court.

Thereafter defendant herein excepted to said judgment by filing its written exception, which said exception is in words and figures as follows, to wit: [23]

"(Title of Court and Cause.)

EXCEPTION TO JUDGMENT.

The defendant above named hereby excepts to the judgment made and rendered in the above-entitled action on the ground that said judgment is not supported or sustained by the facts in said case as agreed upon between the parties to said action in this, to wit:

That it definitely appears from said agreed facts

that John C. Harris, the assured in the policy of insurance sued on herein breached and failed to perform a material condition of said policy, thus rendering said policy void as to him and that the rights of the plaintiff herein under said policy are no greater than those of said assured.

Dated at San Francisco, California, April 19th, A. D. 1929.

BRONSON, BRONSON & SLAVEN,
Attorneys for Defendant.

The above exception is hereby allowed.

Dated at San Francisco, California, April 19th, A. D. 1929.

FRANK H. KERRIGAN,
Judge."

The within and foregoing bill of exceptions is tendered in due time by defendant Metropolitan Casualty Insurance Company of New York by its attorneys, who pray that the same may be signed, settled and certified as a bill of exceptions.

BRONSON, BRONSON & SLAVEN,
Attorneys for Defendant, Metropolitan Casualty Insurance Company of New York. [24]

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.

THIS IS TO CERTIFY that the foregoing bill of exceptions tendered by the defendant Metropolitan Casualty Insurance Company of New York is correct in every way and is hereby settled and

allowed and made a part of the record in this cause, and that the same contains all of the facts of said action, which said facts were agreed upon by the parties hereto.

Done in San Francisco, California, this 7th day of May, 1929.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Due service and receipt of a copy of the within proposed bill of exceptions is hereby admitted this 23 day of April, 1929.

HARRY I. STAFFORD,
DANIEL R. SHOEMAKER,
Attorneys for Plaintiff.

Filed Apr. 23, 1929. [25]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable FRANK H. KERRIGAN, District Judge:

The above-named defendant, Metropolitan Casualty Insurance Company of New York, feeling aggrieved by the judgment rendered and entered in the above-entitled cause on the 1st day of April, 1929, does hereby appeal from said judgment to the Circuit Court of Appeals of the United States of America in and for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith, and it prays that its appeal be allowed and

that citation be issued as provided by law, and that a duly authenticated transcript of the record, proceedings and documents upon which said judgment was based be sent to the said Circuit Court of Appeals of the United States of America in and for the Ninth Circuit under the rules of such court in such case made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of him be made.

Dated at San Francisco, Cal., this 24th day of April, 1929.

BRONSON, BRONSON & SLAVEN,
Attorneys for Defendant. [26]

[Endorsed]: Due service and receipt of a copy of the within petition for appeal is hereby admitted this 24th day of April, 1929.

D. R. SHOEMAKER,
HARRY I. STAFFORD,
Attorneys for Plaintiff.

Filed Aprl. 24, 1929. [27]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes the defendant above named, Metropolitan Casualty Insurance Company of New York, a corporation, by its attorneys, Bronson, Bronson and Slaven, and specifies the following as the errors

upon which it will rely and which it will urge on its appeal in the above-entitled cause, to wit:

I.

That the judgment in said action is not supported or sustained by the facts in said case as agreed upon between the parties to said action, in this, to wit: That it definitely appears from said agreed facts that John Harris, the assured in the policy of insurance sued on herein, breached and failed to perform a material condition of said policy, thus rendering said policy void as to him, and that the rights of the plaintiff herein under said policy are no greater than those of said assured.

II

That the judgment in said action is not supported or sustained by the facts in said case as agreed upon between the parties in said action, in this, to wit: That it definitely [28] appears from said agreed facts that John Harris, the assured in the policy of insurance sued on herein, breached and failed to perform a material condition of said policy, thus rendering said policy void as to him and defeating all of his rights under said policy, and that the rights of plaintiff herein under said policy are no greater than those of said assured; that said failure of performance and said breach by said John Harris of a material condition of said policy consisted in this, to wit: That said John Harris failed to forward according to the terms of said policy to said Metropolitan Casualty Insurance Company of New York, defendant herein, the summons served upon

him in the action brought by plaintiff above named against him for damages for personal injuries arising out of the use, maintenance and operation of the automobile of said John Harris, and that said John Harris failed according to the terms of said policy to notify said Metropolitan Casualty Insurance Company of New York of said service upon him of said summons.

III.

That the judgment in said action is not supported or sustained by the agreed facts in said case in this, to wit: That it definitely appears from said agreed facts that Metropolitan Casualty Insurance Company of New York, defendant herein, did not receive until the 12th day of May, 1927, the summons, or any copy thereof, served upon John Harris, the assured in the policy of insurance sued on herein, in the action brought against him by plaintiff herein in the county of Napa, State of California, and that said Metropolitan Casualty Insurance Company of New York, defendant herein, did not receive until said 12th day of May, 1927, any notice of the service upon said John Harris of said summons. [29]

IV.

That the judgment in this case is not supported or sustained by the facts in this case as hereinabove in the above assignments of error pointed out.

V.

That said judgment is contrary to law.

WHEREFORE, said defendant Metropolitan Casualty Insurance Company of New York prays

that the said judgment of the District Court of the United States may be reversed and held for naught.

Dated April 24, 1929.

BRONSON, BRONSON & SLAVEN,
Attorneys for Defendant, Metropolitan Casualty Insurance Company of New York.

[Endorsed]: Due service and receipt of a copy of the within assignment of errors, is hereby admitted this 24th day of April, 1929.

D. R. SHOEMAKER,
HARRY I. STAFFORD,
Attorneys for Plaintiff.

Filed April 24, 1929. [30]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

On petition of the attorneys for the defendant in the above-entitled action, it is hereby ordered that an appeal to the Circuit Court of Appeals of the United States of America in and for the Ninth Circuit from the judgment heretofore made, filed and entered herein, be and the same is hereby allowed and that a duly authenticated transcript of the record, proceedings and documents upon which said judgment was based and of all proceedings in said case be transmitted to the Clerk of said Circuit Court of Appeals of the United States of America in and for the Ninth Circuit.

It is further ordered that the bond on appeal be fixed at the sum of $6,250.00, the same to act as a supersedeas bond and also as a bond for costs and damages on appeal.

Dated at San Francisco, California, this 24 day of April, 1929.

FRANK H. KERRIGAN,
District Judge.

[Endorsed]: Due service and receipt of a copy of the within order allowing appeal, is hereby admitted this 24th day of April, 1929.

HARRY I. STAFFORD,
DANIEL R. SHOEMAKER,
Attorneys for Plaintiff.

Filed Apr. 24, 1929. [31]

[Title of Court and Cause.]

ORDER AUTHORIZING TRANSFER OF EXHIBITS.

Good cause appearing therefor, it is hereby ORDERED that the original papers, documents and records introduced in evidence at the trial of the above-entitled action and constituting the exhibits therein, be transmitted and transported to the Clerk of the Circuit Court of Appeals of the United States of America in and for the Ninth Circuit, together with and when the Clerk of this court shall transmit to the said Clerk of said Circuit Court of Appeals, a true copy of the record, bill of exceptions, assign-

ment of errors and all of the proceedings in the case upon any appeal allowed herein.

Dated at San Francisco, this 23d day of April, 1929.

FRANK H. KERRIGAN,
District Judge.

[Endorsed]: Due service and receipt of a copy of the within order authorizing transfer of exhibits is hereby admitted this 23 day of April, 1929.

HARRY I. STAFFORD,
DANIEL R. SHOEMAKER,
Attorneys for Plaintiff.

Filed Apr. 23, 1929. [32]

[Title of Court and Cause.]

BOND ON APPEAL AND ORDER APPROVING SAME.

KNOW ALL MEN BY THESE PRESENTS, that we, Metropolitan Casualty Insurance Company of New York, a corporation, as principal, and Commercial Casualty Insurance Company, a corporation, as surety, are held and firmly bound unto Muriel E. Colthurst, plaintiff in the above-entitled action in the full and just sum of Six Thousand Two Hundred Fifty ($6,250) Dollars to be paid to the said Muriel E. Colthurst, her executors, administrators or assigns; to which payment well and truly to be made we bind ourselves jointly and severally by these presents.

Sealed with our seals and dated this 24th day of April, in the year of our Lord one thousand nine hundred twenty-nine.

WHEREAS, lately at a District Court of the United States of America for the Northern District of California, Southern Division, in a suit pending in said court between said Muriel E. Colthurst, plaintiff therein, and said Metropolitan Casualty Insurance Company of New York, a corporation, defendant therein, a judgment was rendered against the said [33] defendant Metropolitan Casualty Insurance Company of New York, and the said defendant Metropolitan Casualty Insurance Company of New York having obtained from said court an appeal to reverse the judgment in the aforesaid suit and a citation directed to the said Muriel E. Colthurst citing and admonishing her to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, in the State of California, within thirty days after the date of said citation.

NOW, THEREFORE, the condition of the obligation is such that if the said appellant Metropolitan Casualty Insurance Company of New York shall prosecute its appeal to effect and answer all damages and costs if it fail to make its plea good, then the obligation to be void; else to remain in full force and effect.

In case of a breach of any condition hereof, the above-entitled court may upon notice to said Commercial Casualty Insurance Company, surety hereunder, of not less than ten days proceed summarily

in the above-entitled action or proceeding to ascertain the amount which said surety is bound to pay on account of such breach and render judgment against said surety and award execution therefor.

METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK,
Principal.

[Seal] By D. ELMER DYER,
Its Attorney-in-fact.

COMMERCIAL CASUALTY INSURANCE COMPANY,
Surety.

[Seal] By A. W. SISK,
Its Attorney-in-fact. [34]

State of California,
City and County of San Francisco,—ss.

On this 24th day of April in the year one thousand nine hundred and twenty-nine, before me, Etta Laidlaw, a notary public in and for the city and county of San Francisco, personally appeared D. Elmer Dyer and A. W. Sisk, known to me to be the persons whose names are subscribed to the within instrument as the attorneys-in-fact of the Metropolitan Casualty Insurance Company of New York and Commercial Casualty Insurance Company respectively and severally acknowledged to me that they subscribed the names of said Metropolitan Casualty Insurance Company of New York and said Commercial Casualty Insurance Company

thereto respectively as principals, and their own names respectively as attorneys-in-fact.

[Seal] ETTA LAIDLAW,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires June 14, 1929.

Examined and recommended for approval.

BRONSON, BRONSON & SLAVEN,
Attorneys for Defendant Metropolitan Casualty Insurance Company of New York.

The within bond is hereby approved both as to sufficiency and form this 24 day of April, A. D. 1929.

FRANK H. KERRIGAN,
District Judge.

[Endorsed]: Due service and receipt of a copy of the within bond on appeal is hereby admitted this 24th day of April, 1929.

HARRY I. STAFFORD,
DANIEL R. SHOEMAKER,
Attorneys for Plaintiff.

Filed Apr. 24, 1929. [35]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

Sir: The defendant Metropolitan Casualty Insurance Company of New York respectfully requests that you prepare, properly authenticate, certify and file in the United States Circuit Court of Appeals for the Ninth Circuit, San Francisco, California, for use on appeal in that court the follow-

ing papers, orders and proceedings filed and had in this cause:

(1) Amended complaint.
(2) Answer to amended complaint.
(3) Stipulation waiving jury.
(3a) Trial.
(4) Judgment.
(5) Exception to judgment.
(6) Stipulation re agreed statement of facts—filed April 19th, 1929.
(7) Order extending time to file bill of exceptions.
(8) Bill of exceptions.
(9) Order authorizing transfer of exhibits.
(10) All exhibits as per above order.
(11) Petition for appeal. [36]
(12) Assignment of errors.
(13) Order allowing appeal.
(14) Bond on appeal.
(15) Citation on appeal.
(16) This praecipe.

Dated: this 7th day of May, A. D. 1929.

BRONSON, BRONSON & SLAVEN,
Attorneys for Defendant Metropolitan Casualty Insurance Company of New York.

[Endorsed]: Due service and receipt of a copy of the within praecipe is hereby admitted this 7th day of May, 1929.

HARRY I. STAFFORD,
DANIEL A. SHOEMAKER,
Attorneys for Plaintiff.

Filed May 8, 1929. [37]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing 37 pages, numbered from 1 to 37, inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the praecipe for record on appeal, as the same remain on file and of record in the above-entitled suit, in the office of the Clerk of said United States District Court, and the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $18.25, that the said amount was paid by the appellant and that the original citation issued in said suit is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 21st day of May, A. D. 1929.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern District of California.

By J. A. Schaertzer,
Deputy Clerk. [38]

CITATION ON APPEAL.

United States of America,—ss:

The President of the United States, to Muriel E. Colthurst and to Harry I. Stafford, Esq., and Daniel R. Shoemaker, Esq., Her Attorneys: GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, Southern Division, wherein Metropolitan Casualty Insurance Company of New York, a corporation, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. KERRIGAN, United States District Judge for the Northern District of California, Southern Division, this 24th day of April, A. D. 1929.

FRANK H. KERRIGAN,
United States District Judge.

Receipt of a copy of the within citation on appeal is hereby admitted this 24th day of April, 1929.

HARRY I. STAFFORD,
DANIEL R. SHOEMAKER,
Attorneys for Appellee.

[Endorsed]: Citation on Appeal. Filed Apr. 24, 1929. [39]

[Endorsed]: No. 5823. United States Circuit Court of Appeals for the Ninth Circuit. Metropolitan Casualty Insurance Company of New York, a Corporation, Appellant, vs. Muriel E. Colthurst, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed May 20, 1929.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

PLAINTIFF'S EXHIBIT No. 2.

No. N. V. J. 602901

AUTOMOBILE POLICY

Combined—No Endorsement Form

THE AGRICULTURAL INSURANCE COMPANY

Of Watertown, N. Y.

Hereinafter Called This Company

In Consideration of the Warranties and the Premium Hereinafter Mentioned

Does Insure

the Assured named herein, and legal representatives, for the term herein specified, to an amount not exceeding the amount of insurance herein specified, against direct loss or damage, from the perils insured against, to the body, machinery, and equipment of the automobile described herein while within the limits of the United States (exclusive of Alaska, the Hawaiian and Phillippine Islands, Porto Rico, Canal Zone, Guam and Samoa) and Canada, including while in building, on road, on railroad car or other conveyance, ferry or inland steamer, or coastwise steamer between ports within said limits.

Acceptance

This policy is made and accepted subject to the provisions, exclusions, conditions and warranties set forth herein or endorsed hereon, and upon acceptance of this policy the Assured agrees that its terms embody all agreements then existing between himself and the Company or any of its agents relating to the insurance described herein, and no officer, agent or other representative of this Company shall have power to waive any of the terms of this policy unless such waiver be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the Assured unless so written or attached.

PERILS INSURED AGAINST

This Policy Insures Only Against the Peril or Perils Described in the Following Sections ("A to H") for Which a Premium Charge is Made as Indicated in the Corresponding Section or Sections of the Foregoing "Schedule of Coverages"

Section A.

Fire, arising from any cause whatsoever; and lightning;

Section B.

While being transported in any conveyance by land or water—the stranding, sinking, collision,

burning or derailment of such conveyance, including general average and salvage charges for which the Assured is legally liable.

Section C.

Theft, Robbery and Pilferage, excepting by any person or persons in the Assured's household, or in the Assured's service or employment, whether the theft, robbery or pilferage occurs during the hours of such service or employment or not; and excepting loss suffered by the Assured from voluntary parting with title and/or possession, whether or not induced so to do by any fraudulent scheme, trick, device or false pretense or otherwise; and excepting in any case, other than the theft of the entire automobile described herein, the theft, robbery or pilferage of tools, repair equipment, motor meters, extra tires and/or tubes and/or rims and/or wheels and/or extra or ornamental fittings.

This policy does not insure against the wrongful conversion, embezzlement or secretion by a mortgagor, vendee, lessee or other person in lawful possession of the insured property under a mortgage, conditional sale, lease or other contract or agreement, whether written or verbal.

Section D. Property Damage.

The Assured's legal liability to other persons for the injury to or, destruction of the property of such persons (including resultant loss of use of such property), and in addition thereto the legal expenses incurred by the Assured with the consent

of this Company in connection with such injury or destruction, resulting solely and directly from the ownership, maintenance and use of the automobile herein described, including loading and unloading, provided such injury or destruction occurs during a period covered by this policy, subject, however, to the following limitations and exclusions.

(1) Property of the assured, or in charge of the assured or of any of his employees, or carried in or upon the automobile described herein, is excluded from this coverage;

(2) This Company's liability for injury or destruction is limited to the actual cash value of the property destroyed at the time of its destruction and/or the actual cost of the suitable repair of the property injured, but in no case shall this Company be liable with respect to claims (including claims for loss of use) arising from one accident for more than $1000.00, and in addition thereto the legal expenses incurred by the Assured with the consent of the Company.

(3) The insurance under this clause does not attach or cover while the automobile insured is engaged in any race or speed contest, or while being operated by any person under the age limit fixed by law or in any event under the age of sixteen years.

It is a condition of this clause that if action be brought against the Assured to enforce a claim for damage covered hereunder, he shall immedi-

ately notify this Company and promptly forward to it every summons or other paper or process served on or received by him in connection therewith. It is a condition of this clause that the Assured whenever requested by this Company, shall aid in effecting settlement, securing information and evidence, and the attendance of witnesses; but the Assured, without the written consent of the Company, previously given, shall not voluntarily assume any liability, or interfere in any negotiation for settlement or in any legal proceeding, or incur, any expense, or settle any claim, except at his own cost.

The terms and conditions of this Property Damage Clause are so extended as to be available, in the same manner and under the same conditions as they are available to the named Assured, to any person or persons while riding in or legally operating any of the automobiles described in the policy, and to any person, firm or corporation legally responsible for the operation thereof, provided such use or operation is with the permission of the named Assured, or, if the named Assured is an individual, with the permission of an adult member of the named Assured's household other than a chauffeur or a domestic servant; except that the terms and conditions of this clause shall not be available to a public automobile garage, automobile repair shop, automobile sales agency, automobile service station, and the agent or employees thereof. The unqualified term "assured" wherever used in this policy shall include in each

instance any other person, firm or corporation entitled to indemnity under the provisions and conditions of this clause, but the qualified term "named Assured" shall apply only to the assured named in the Policy.

The insolvency or bankruptcy of the Assured shall not release the Company from payment, of claim or loss under this clause and in case execution against the Assured is returned unsatisfied in an action brought by the injured, or his or her personal representative, because of such insolvency or bankruptcy, an action may be maintained by the injured, or his or her personal representative, against this Company, under the terms of this policy, for the amount of the judgment in the said action not exceeding the limit of this Company's liability for "Property Damage" coverage named in this clause.

Section E. Collision Clause.

Actual loss or damage to the automobile insured caused solely by accidental collision with another object, or by upset, but in any event excluding:

(1) Loss or damage to any tire, due to puncture, cut, gash, blowout, or other ordinary tire trouble; and excluding in any event loss or damage to any tire, unless caused in an accidental collision or upset which also causes other loss or damage to the insured automobile;

(2) Loss or damage occurring while the automobile insured is engaged in any race or speed contest or while being operated by any person

under the age limit fixed by law or in any event under the age of sixteen years.

The Company's liability for loss or damage under this clause by reason of any one collision or upset covered hereby is limited to the actual cash value of the property destroyed at the time of its destruction, or the cost of its suitable repair or replacement, (less any deduction provided for in Section E of the schedule of coverages, each accident being deemed a separate claim and said sum to be deducted from the amount of each claim when determined).

Section F. Limited Coverage Collision Clause.

Against actual loss or damage to the automobile insured, if caused solely by accidental collision with another object, or by upset, each accident being deemed a separate claim, provided that,

(a) Loss or damage caused directly or indirectly by fire shall not be covered hereby.

(b) Loss or damage to bumpers, fenders, steps, running boards, running board aprons, headlights, tail-lights and signaling devices shall not be covered hereby.

(c) Loss or damage to any tire, due to puncture, cut, gash, blowout or other ordinary tire trouble shall not be covered hereby and excluding in any event loss or damage to any tire, unless caused in an accidental collision or upset which also causes other loss or damage covered by this clause.

(d) Loss or damage occurring while the automobile insured is engaged in any race or speed con-

test or while being operated by any person under the age limit fixed by law or in any event under the age of sixteen years shall not be covered hereby, The amount recoverable for accidental collision or upset under this clause shall not exceed the actual cash value of the property covered hereunder at the time of any loss or damage, but shall not be limited by the amount of insurance named in the policy to which this clause is attached.

Section G. Theft Extra Equipment.

Theft, robbery or pilferage of motometers, extra tires and/or tubes and/or rims and/or wheels and/or extra or ornamental fittings. It is specifically stipulated and agreed, however, that this insurance shall not be extended to cover theft, robbery or pilferage by any person or persons in the Assured's household or in the Assured's service or employment, whether the said theft, robbery or pilferage occur during the hours of such service or employment or not, or the wrongful conversion, embezzlement, or secretion by mortgagor or vendee in possession under mortgage, conditional sale or lease agreement.

Section H. Tornado, Cyclone, Windstorm, Earthquake, Explosion, Water Damage and Hail Coverage.

Direct loss or damage caused by Tornado, Cyclone, Windstorm, Hail, Earthquake, Explosion, Accidental and External Discharge or Leakage of Water excluding damage caused by rain, sleet,

snow, flood, rupture of tires and explosion within the combustion chamber of an internal combustion engine.

Locking Device Allowance Clause.

In consideration of the reduced THEFT premium (if a reduction is granted under the schedule of coverages) it is warranted by the Assured that the automobile insured under this policy will be continuously equipped with the Locking Device mentioned herein (approved by the Underwriters Laboratories of the National Board of Fire Underwriters and bearing their label.) The Assured undertakes during the currency of this policy to use all diligence and care in maintaining the efficiency of said locking device and in locking the automobile when leaving the same unattended.

Bumper Allowance Clause.

In consideration of the reduced COLLISION premium (if a reduction is granted under the schedule of coverages), it is warranted by the Assured that the automobile insured under this policy is and will be continuously equipped with a bumper or bumpers mentioned herein (approved by the Underwriters Laboratories of the National Board of Fire Underwriters. The Assured undertakes to use all diligence and care in maintaining the efficiency of said bumper or bumpers throughout the life of this policy.

CONDITIONS.

Warranties by the Assured.

The Assured's occupation or business where the subject of this insurance is used in connection therewith, the description of the automobile insured, the facts with respect to the purchase of same, the uses to which it is and will be put, and the place where it is usually kept, as set forth and contained in this policy, are statements of facts known to and warranted by the Assured to be true, and this policy is issued by the company relying upon the truth thereof.

Property Excluded—War, Riot, Etc.

This company shall not be liable for

(a) Loss or damage to robes, wearing apparel, personal effects, or extra bodies;

(b) Loss or damage caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, military, naval or usurped power, or by order of any civil authority.

Other Insurance.

No recovery shall be had under this policy, if at the time a loss occurs there be any other insurance covering such loss, which would attach if this insurance had not been affected.

Cancellation.

This policy shall be cancelled at any time at the request of the Assured, in which case the Com-

pany shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rate premium for the expired term. This policy may be cancelled at any time by the Company by giving to the Assured a five (5) days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired term, which excess if not tendered shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand. Notice of cancellation mailed to the address of the Assured stated in this policy shall be a sufficient notice.

Limitation of Liability and Method of Determining Same.

This Company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated accordingly, with proper deduction for depreciation however caused (and without compensation for the loss of use of the property), and shall in no event exceed what it would then cost to repair or replace the automobile or such parts thereof as may be damaged with other of like kind and quality; such ascertainment or estimate shall be made by the Assured and this Company, or if they differ, then by appraisal as hereinafter provided.

Abandonment.

It shall be optional with this Company to take all or any part of the property at the appraised value where appraisal is had as hereinafter provided, but there can be no abandonment thereof to this Company; and where theft is insured against the Company shall have the right to return a stolen automobile or other property with compensation for physical damage, at any time before actual payment hereunder.

Loss for Which Bailee for Hire is Liable.

This Company shall not be liable for loss or damage to any property insured hereunder while in the possession of a bailee for hire under a contract, stipulation or assignment whereby the benefit of this insurance is sought to be made available to such bailee. Where loss or damage occurs for which a bailee may be liable and which would otherwise be covered hereunder, this Company will advance to the Assured by way of loan the money equivalent of such loss or damage, which loan shall in no circumstances affect the question of the Company's liability hereunder and shall be repaid to the extent of the net amount collected by or for account of the Assured from the bailee after deducting cost and express of collection.

Noon.

The word "Noon" herein means noon of standard time at the place the contract was made.

Misrepresentation and Fraud.

This entire policy shall be void if the Assured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof; or in case of any fraud, attempted fraud, or false swearing by the Assured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

Title and Ownership.

This entire policy shall be void unless otherwise provided by agreement in writing added hereto:
(a) If the interest of the Assured in the subject of this insurance be other than unconditional and sole ownership; or in case of transfer or termination of the interest of the Assured other than by death of the Assured or in case of any change in the nature of the insurable interest of the Assured in the property described herein either by sale or otherwise; or
(b) If this policy or any part thereof shall be assigned before loss.

Encumbrance and Limitation of Use.

Unless otherwise provided by agreement in writing added hereto, this Company shall not be liable for loss or damage to any property insured hereunder;
(a) While encumbered by any lien or mortgage;
(b) While the automobile described herein is frequently or habitually used as a public or livery conveyance for carrying passengers for com-

pensation, and for one week after the termination of said use; or while being rented under contract or leased, or operated in any race or speed contest.

Protection of Salvage.

In the event of loss or damage occasioned by a peril insured against herein the Assured shall protect the property from further loss or damage and any such further loss or damage occurring directly or indirectly from a failure to protect shall not be recoverable under this policy. Any such act of the Assured or this Company or its agents in recovering, saving and preserving the property described herein, shall be considered as done for the benefit of all concerned and without prejudice to the rights of either party, and all reasonable expenses thus incurred shall constitute a claim under this policy; provided however that this Company shall not be responsible for the payment of a reward offered for the recovery of the insured property unless authorized by the Company.

Notice and Proof of Loss.

In the event of loss or damage the Assured shall give forthwith notice thereof in writing to this Company; and within sixty (60) days after such loss, unless such time is extended in writing by this Company, shall render a statement to this Company signed and sworn to by the Assured, stating the place, time and cause of the loss or damage, the interest of the Assured and of all

others in the property, the sound value thereof and the amount of loss or damage thereon, all encumbrances thereon, and all other insurance whether valid or not covering said property; and the Assured, as often as required, shall exhibit to any person designated by this Company all that remains of the property insured and submit to examinations under oath by any person named by this Company, and subscribe the same; and as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this Company or its representatives, and shall permit extracts and copies thereof to be made.

It is a condition of this policy that failure on the part of the Assured to render such sworn statement of loss to the Company within sixty days of the date of loss (unless such time is extended in writing by the Company) shall render such claim null and void.

Appraisal.

In case the Assured and this Company shall fail to agree as to the amount of loss or damage, each shall, on the written demand of either, select a competent and disinterested appraiser. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen (15) days to agree upon such umpire then, on request of the Assured or this Company, such umpire shall be

selected by a judge of a court of record in the County and State in which the property insured was located at time of loss. The appraisers shall then appraise the loss and damage, stating separately sound value and loss or damage to each item; and failing to agree, shall submit their differences only, to the umpire. An award in writing, so itemized, of any two when filed with this Company shall determine the amount of sound value and loss or damage. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.

Payment of Loss.

This Company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal, or to any examination herein provided for; and the loss shall in no event become payable until sixty (60) days after the notice, ascertainment, estimate and verified proof of loss herein required have been received by this Company, and if appraisal is demanded, then, not until sixty days after an award has been made by the appraisers.

Subrogation.

This Company may require from the Assured an assignment of all right of recovery against any party for loss or damage to the extent that payment therefor is made by this Company.

Suit Against Company.

No suit or action on this policy or for the recovery of any claim hereunder shall be sustainable in any court of law or equity unless the Assured shall have fully complied with all the foregoing requirements, nor unless commenced within twelve (12) months next after the happening of the loss: provided that where such limitation of time is prohibited by the laws of the State wherein this policy is issued, then and in that event no suit or action under this policy shall be sustainable unless commenced within the shortest limitation permitted under the laws of such State.

Provisions Required by Law to be Stated in this Policy.—This policy is in a stock corporation.

In Witness Whereof this Company has executed and attested these presents: but this policy shall not be valid until countersigned by the duly authorized Agent of the Company.

P. H. WILLIAMS,
President.

H. R. WAITE
Sec.-Treas.

Countersigned at Vallejo, California this 1st day of
City State
May 1926.

By ALMA CORBETT, Agent.

PASTE ENDORSEMENTS HERE.

The term of this Policy is 12 months, beginning on the 1st day of May, 1926, noon, and ending on the 1st day of May, 1927, noon, standard time.

SCHEDULE OF WARRANTIES APPLYING TO BOTH POLICIES.

The following are statements of facts known to and warranted by the Assured to be true, and these policies are issued by the Companies relying upon the truth thereof:

Statement 1: Name of Assured: JOHN C. HARRIS.

. . . . . .

Statement 2: Address of Assured: c/o U. S. S. MacDonough, Postmaster, San Francisco.

Statement 3: The Assured is Individual.

Statement 4: The automobile covered by this policy is described in the following table:

Description of Automobile.

Trade Name	Factory or Motor Number	Year of Model	Model Letter, or Number	Type of Body	Kind of Power
Studebaker	21512	1926	Big Six	Sport Roadster	

The facts with respect to the purchase of automobile described are as follows:

Purchased by the Assured			Actual Cost to Assured Including Equipment	The Automobile described is fully paid for by the Assured and is not Mortgaged or otherwise Encumbered, except as follows
Month	Year	New or Second Hand		
May	1926	New	$2072.00	Balance due Guhl Motor Co.

Statement 5: The Assured's trade or business is U. S. N. Officer.

Statement 6: The automobile described above is owned exclusively by the Assured named in statement 1, except as follows:

Balance due Guhl Motor Company.

Statement 7: The automobile described above, throughout the term of this policy, will be used for the following purposes only, namely: business and pleasure as defined below.

(a) The term pleasure and business purposes is defined as professional and business use including personal, pleasure, and family use, but excluding regular or frequent commercial delivery.

(b) The term commercial purposes is defined as use for the transporting and delivering--including actual loading and actual unloading—of merchandise.

Statement 8: No trailers will be used except as follows: no exceptions.

Statement 9: The Assured will not during the term of this policy rent any automobile to others or use any automobile to carry passengers for a consideration, actual or implied.

Statement 10: No personal injury or death has, during the past three years, been caused by any automobile driven by or for the Assured, except as follows: no exceptions.

Statement 11: The automobile described above throughout the term of this policy will be principally maintained, garaged, and used in the city or town named in statement 2, except as follows: Vallejo, California.

Statement 12: No company during the past three year has refused to issue automobile insurance to the Assured and no company has canceled during the said period any such insurance issued to the Assured, except as follows: no exceptions.

SCHEDULE OF COVERAGES.

The insurance granted by the Agricultural Insurance Company under its Policy applies only to those Sections of the "Perils Insured Against" for which a premium charge is made as indicated in the following Schedule subject to the specified amounts, limitations, and deductions stated therein, and also to all other terms, agreements, conditions and warranties of the Policy. Any other coverages to be included must be added by endorsements and the

titles and premium charges therefor recorded under Section I or J of the following schedule.

The Metropolitan Casualty Insurance Company grants indemnity against Public Liability (as defined herein) only when the limits of liability are recorded and a premium charge made in the respective spaces provided for these entries under Section Z of the Schedule below.

Sections	Perils	Rates and Limits of Liability.	Premium Charges Gross	Reductions	Net
A&B	Fire, Lightning, Transportation	Amount of Insurance $1800 @ $.50 per $100	$ 9.00		$ 9.00
C	Theft	Amount of Insurance $1800 @ $.50 per $100	$ 9.00	For Locking Dev $	$ 9.00
D	Property Damage	Limit of liability of Company on account of any one accident is $1000	$ 9.00	$	$ 9.00
E	Collision	Amount to be deducted from each separate claim $ nil	$41.12	For Bumper (s) $	$41.12
F	Limited Coverage Collision	Amount deductible as defined in Section F of the "Perils Insured Against."	$	For Bumper (s) $	$ nil
G	Theft Extra Equipment	Amount of Insurance $.....@ $..... per $100	$		$ nil
H	Tornado, Cyclone, Windstorm, Earthquake, Etc.	Amount of Insurance $.....@ $..... per $100	$	$	$ nil

Sections	Perils	Rates and Limits of Liability.	Premium Charges Gross	Reductions	Net
I		Amount of Insurance $.....@ $..... per $100	$		$ nil
J		Amount of Insurance $.....@ $..... per $100	$	$	$ nil
		Total Premium—Agricultural Ins. Co			$68.12
Z	Public Liability	Limit "for one person" as defined in Condition "Z" Five Thousand Dollars ($ 5,000.)			
		Limit "for one accident" as defined in Condition "Z" Ten Thousand Dollars ($10,000.00)			
		Total Premium—Metropolitan Cas. Ins. Co.			$15.00
		Total Premiums—Both Companies			$83.12

ALMA CORBETT, Agent.

No. C. M. 602901

AUTOMOBILE LIABILITY POLICY.

THE METROPOLITAN CASUALTY INSURANCE CO.

of New York.

Charted April 22nd, 1874

Hereinafter Called the Company

IN CONSIDERATION OF THE PREMIUM AND THE DECLARATIONS SET FORTH IN THE SCHEDULE OF STATEMENTS HERETO AND SUBJECT TO THE TERMS, LIMITS AND CONDITIONS SET FORTH HEREIN

DOES HEREBY INSURE

the Assured named and described as such in the Schedule of Statements hereto,

Against loss and/or expense, arising or resulting from claims upon the Assured for damages in consequence of an accident occurring within the limits of the *United States and Canada* during the term of this policy, by reason of the *ownership, maintenance* or *use,* (including the carrying of goods thereon and the loading and unloading thereof when commercially used) *of the automobile or any of the automobiles* enumerated and described herein resulting in

(A) BODILY INJURIES, OR DEATH resulting at any time therefrom, suffered by any person or persons, excepting: (a) the Assured's employe

or employes while engaged in operating or caring for any of the Assured's automobiles, (b) any other employe of the Assured who is injured when engaged at the time of such injury in performing any duty for the Assured in connection with the trade, business or occupation of the Assured.

The Company's liability to one or all Assured's on account of bodily injuries and/or death to any one person under Paragraph (A) above is limited to the amount specified in Section Z of the Schedule of Coverages and subject to the same limit for each person, the Company's total liability for loss from any one accident is limited to the amount specified in Section Z of the Schedule of Coverages.

IN ADDITION TO THE ABOVE, THE COMPANY DOES HEREBY AGREE

(1) TO DEFEND in the name and on behalf of the Assured *any suit* brought against the Assured to enforce a claim, *whether groundless or not,* on account of damages suffered or alleged to be suffered under the circumstances hereinbefore described;

(2) TO PAY THE EXPENSES incurred in defending any suit described in the preceding paragraph, also the *interest* on any judgment within the limits of the insurance hereby granted and any *costs* taxed against the Assured on account thereof;

(3) TO REIMBURSE the Assured for the *expense* incurred in providing such *immediate surgical relief* as is imperative at the time of any accident covered hereunder;

(4) TO EXTEND THE INSURANCE provided by this policy so as to be available, in the same manner and under the same conditions as it is available to the named Assured, to any person or persons while riding in or legally operating any of the automobiles covered hereunder, and to any person, firm or corporation legally responsible for the operation thereof, (excepting always a public garage, automobile repair shop and/or sales agency and/or service station and agents and employes thereof), provided such use or operation is with the permission of the named Assured; or, if the named Assured is an individual, with the permission of an adult member of the named Assured's household other than a chauffeur or a domestic servant. In no event shall the extension of insurance provided in the foregoing clause be construed to cover the purchaser of the automobile or automobiles covered by this policy, if sold, or the transferee or assignee of this policy except by the direct consent of the Company given in the manner indicated in paragraph E of this policy;

(5) THE INSOLVENCY OF BANKRUPTCY of the Assured hereunder shall not release the Company from the payment of damages for injuries sustained or loss occasioned during the life of this policy, and in case execution against the Assured is returned unsatisfied because of such insolvency or bankruptcy in an action brought by the injured or his or her personal representative in case death results from the accident, then an action may be

maintained by the injured person or his or her personal representative against the Company under the terms of the policy for the amount of the judgment in the said action, not exceeding the amount of the policy.

THIS POLICY IS SUBJECT TO THE FOLLOWING CONDITIONS:

PARAGRAPH A. THE POLICY SHALL NOT COVER ANY LIABILITY OF THE ASSURED.

1. Under any Workmen's Compensation agreement, plan or law; or,
2. While any of the insured automobiles is being used for other purposes than specified in the Schedule of Statements of this policy; or,
3. While being operated by any person under the age limit fixed by law, or under the age of sixteen years in any event; or,
4. When used in any race or speed test; or,
5. When used for towing or propelling a trailer unless such privilege is endorsed hereon, or such trailer is also insured by the Company (incidental assistance to a stranded automobile on the road is permitted); or,
6. When used to transport high explosives (carrying of loaded cartridges for gun or pistol, permitted); or,
7. For any liability assumed by the Assured for others under any oral or written contract or agreement.

PARAGRAPH B.

1. Written notice of any accident with the most complete information obtainable at the time must be forwarded to the Home Office of the Company, or to an authorized representative as soon as is reasonably possible. Notice given by or on behalf of the Assured to any authorized agent of the Company with particulars sufficient to identify the Assured shall be deemed to be notice to the Company, and failure to give any notice hereinbefore required shall not invalidate any claim made by the Assured, unless it shall be shown not to have been reasonably possible to give such notice within prescribed time, and that notice thereof, and if suits are brought to enforce such a claim, the Assured shall immediately forward to the Company every summons, or other process as soon as same shall have been served on him.
2. No action by the Assured shall lie against the Company until the amount of the damages for which the Assured is liable by reason of any casualty covered by this policy is determined, either by a final judgment against the Assured or by agreement between the Assured and the plaintiff with the written consent of the Company; nor, unless such action is brought within two years after the rendition of such final judgment.

   If the limitation time for notice of accident or for any legal proceeding herein contained

is at variance with any specific statutory provision in relation thereto, in force in the State or Province in which it is claimed the Assured is liable for any such loss as is covered hereby, such specific statutory provision shall supersede any condition in this policy inconsistent therewith.

3. The Company reserves the right to settle any claim or suit.
4. The Assured shall not voluntarily assume any liability; nor interfere in any negotiations or legal proceedings conducted by the Company on account of any claim; nor, except at Assured's own cost, settle any claim; nor, without the written consent of the Company previously given, incur any expense, except as provided herein for immediate surgical relief at time of accident.
5. Whenever requested by the Company, the Assured shall aid in securing information, evidence and the attendance of witnesses in effecting settlements and in defending suits hereinbefore referred to. The Assured shall at all times render to the Company all reasonable co-operation and assistance.
6. In case of payment of loss and/or expense under this policy the Company shall be subrogated to all rights of the Assured against any person, co-partnership, corporation or estate as respects the amount of such payment, and the Assured shall execute all papers required and shall co-operate with the

Company to secure to the Company such rights.

PARAGRAPH C.

1. NO CHANGE OR WAIVER of any of the terms, conditions or statements of this policy shall be valid unless set forth in an endorsement attached hereto and signed by the President, a Vice-President, one of the Secretaries of the Company, or the Superintendent of the Automobile Department.
2. NOTICE GIVEN TO OR THE KNOWLEDGE of any agent or any other person, whether received or acquired before or after the date of the policy, shall not be held to waive any of its terms, conditions or statements; nor to preclude the Company from asserting any defense under said terms, conditions or statements unless set forth in a duly executed endorsement attached hereto.

PARAGRAPH D.

1. This policy may be canceled at any time by either of the parties hereto upon written notice to the other party stating upon what date thereafter (*not less than five days thereafter when canceled by the Company*) cancelation shall be effective, upon which date, at twelve o'clock noon, the policy shall terminate.
2. Registered mailing of such notice by the Company or the Assured to the stated address of the other party or the return of the policy by the Assured shall be sufficient notice.

3. If canceled by the Company, the earned premium shall be computed upon a pro rata basis; if canceled by the Assured, it shall be computed in accordance with the short rate table printed hereon and the Company shall repay to the Assured in either event the unearned portion of the premium so determined.

PARAGRAPH E

1. No assignment of interest under this policy shall be valid unless the signed transfer of the assignor, (the named Assured) is endorsed hereon, accepted by the assignee and the assignment approved by the Company or a duly authorized agent.

PARAGRAPH F.

1. If the named Assured carries a policy of another insurer against loss covered by this policy, the named Assured shall not be entitled to recover from the Company a larger proportion of the entire loss than the amount hereby insured bears to the total amount of the named Assured's valid and collectible insurance. If any other person, firm or corporation included in this insurance is covered by valid and collectible insurance against a claim also covered by this policy, such other person, firm or corporation shall not be entitled to indemnity or protection under this policy.
2. The Company shall be permitted, at all reasonable times during the policy period, to in-

spect any of the automobiles covered hereunder; and if the policy premium is based in whole or in part upon payroll or service records of the Assured, the accounts and records of the Assured in relation thereto shall also be available for inspection and audit by any authorized representative of the Company.

In Witness Whereof, THE METROPOLITAN CASUALTY INSURANCE COMPANY has caused this Policy to be signed by its President and its Secretary, but the same shall not be binding upon the Company until countersigned by a duly authorized representative of the Company.

J. Wm. BURTON, Secretary.

J. ROWE, President.

Countersigned at Vallejo, California this 1st day
City State
of May 1926.

By ALMA CORBETT,
Authorized Representative.

COMBINED AUTOMOBILE POLICIES
ASSURED

.....

.....

Total Premium, $.....

Expires .....

No. N. V. J. ————

THE AGRICULTURAL INSURANCE COMPANY

of Watertown, N. Y.

and

THE

METROPOLITAN CASUALTY INSURANCE COMPANY

of New York

No. C. M. ————.

EDWARD BROWN & SONS
Pacific Coast General Agents
200 Bush Street
San Francisco, Calif.

PLEASE READ YOUR POLICY
CAREFULLY NOTE CONDITIONS
REQUIRING IMMEDIATE NOTICE
OF ACCIDENT

[Endorsed]: United States District Court. No. 18077. Colthurst vs. Met. Pltf. Exhibit No. 2. Filed 2/20/29. Walter B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.

No. 5823. United States Circuit Court of Appeals for the Ninth Circuit. Filed May 20, 1929. Paul P. O'Brien, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, a Corporation,

Appellant,

vs.

MURIEL E. COLTHURST,

Appellee.

STIPULATION RE PRINTING OF EXHIBITS.

IT IS HEREBY STIPULATED by and between the parties to the above-entitled action that none of the exhibits in this action shall be printed except the following:

The insurance policy issued by Metropolitan Casualty Insurance Company of New York, the exhibit being marked Plaintiff's Exhibit No. 2.

Dated: May 20th, 1929.

BRONSON, BRONSON & SLAVEN,
Attorneys for Appellant.
DANIEL R. SHOEMAKER,
HARRY I. STAFFORD,
Attorneys for Appellee.

[Endorsed]: Filed May 20, 1929. Paul P. O'Brien, Clerk.

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No. 5823

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK (a corporation),

Appellant,

vs.

MURIEL E. COLTHURST,

Appellee.

BRIEF FOR APPELLANT.

BRONSON, BRONSON & SLAVEN,
Hunter-Dulin Building, San Francisco,
Attorneys for Appellant.

H. R. MCKINNON,
Hunter-Dulin Building, San Francisco,
Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

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No. 5823

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK (a corporation),	*Appellant,*
VS.	
MURIEL E. COLTHURST,	*Appellee.*

BRIEF FOR APPELLANT.

PRELIMINARY STATEMENT.

This is an appeal by Metropolitan Casualty Insurance Company of New York from a judgment of the United States District Court for the Northern District of California, Southern Division, in an action brought against it by appellee Muriel E. Colthurst upon an automobile liability insurance policy issued by appellant to one John Harris.

The action was one brought by appellee upon a judgment which appellee had procured against Harris, the assured, for personal injuries alleged to have been sustained by appellee by reason of the operation by Harris of the automobile covered by the insurance policy issued by appellant. Judgment was ren-

dered by the court below on April 1, 1929, in favor of appellee and against appellant in the sum of $5,663.06, together with costs, taxed at $28.00. The case was tried before the Honorable Frank H. Kerrigan, Judge of the court below, sitting without a jury, a jury trial having been waived by written stipulation of the parties. The case was tried and submitted to the court below upon an agreed statement of facts.

ASSIGNMENT OF ERRORS.

By its assignment of errors on file herein appellant sets out five specifications of error. There is but one point, however, which is raised by appellant upon this appeal, and it is this: That John Harris, the assured in the policy of insurance issued by appellant, breached and failed to perform a material condition of the policy of insurance issued to him, thus defeating any rights which he might have had under the policy and that the rights, under said policy, of appellee Muriel E. Colthurst, the injured person, are no greater than the rights of the assured.

This point is sufficiently raised by two of the assignments of error on file herein. These assignments are the ones upon which appellant will rely upon this appeal. They are as follows:

"I.

That the judgment in said action is not supported or sustained by the facts in said case as agreed upon between the parties in said action, in this, to wit: That it definitely appears from

said agreed facts that John Harris, the assured in the policy of insurance sued on herein, breached and failed to perform a material condition of said policy, thus rendering said policy void as to him and defeating all of his rights under said policy, and that the rights of plaintiff herein under said policy are no greater than those of said assured; that said failure of performance and said breach by said John Harris of a material condition of said policy consisted in this, to wit: That said John Harris failed to forward according to the terms of said policy to said Metropolitan Casualty Insurance Company of New York, defendant herein, the summons served upon him in the action brought by plaintiff above named against him for damages for personal injuries arising out of the use, maintenance and operation of the automobile of said John Harris, and that said John Harris failed according to the terms of said policy to notify said Metropolitan Casualty Insurance Company of New York of said service upon him of said summons.

II.

That the judgment in said action is not supported or sustained by the agreed facts in said case in this, to wit: That it definitely appears from said agreed facts that Metropolitan Casualty Insurance Company of New York, defendant herein, did not receive until the 12th day of May, 1927, the summons, or any copy thereof, served upon John Harris, the assured in the policy of insurance sued on herein, in the action brought against him by plaintiff herein in the county of Napa, State of California, and that said Metropolitan Casualty Insurance Company of New York, defendant herein, did not receive until said 12th day of May, 1927, any notice of the service upon said John Harris of said summons."

THE FACTS.

All of the facts in the case, which facts were agreed upon at the trial, are contained in the bill of exceptions. These facts may be stated in substance as follows:

On May 1, 1926, appellant issued to John Harris in the State of California a policy of automobile indemnity insurance by which appellant agreed to indemnify Harris against any liability not exceeding the sum of $5000 with taxed court costs and interest which should arise against him in favor of any person who should sustain any bodily injuries by an accident by reason of the ownership, maintenance or use by Harris of a certain automobile then owned by Harris and referred to in the policy. This policy of insurance was in full force and effect on the 15th day of June, 1926.

On December 3, 1926, an action was commenced by Muriel E. Colthurst, appellee herein, against Harris in the Superior Court of the State of California in and for the County of Solano for damages for personal bodily injuries alleged by her to have been sustained by her while she was riding in Harris' said automobile on the 15th day of June, 1926, at the request and invitation of Harris, said automobile then being operated and controlled by Harris. Harry I. Stafford, Esq. acted as attorney for appellee in said action. Summons in said action was served on Harris about the middle of December, 1926, which summons was forwarded by Harris to appellant. Appellant thereafter engaged the services of Joseph

Raines, Esq., an attorney at law of Fairfield, Solano County, California, to conduct the defense of Harris in said action and to act as the agent of appellant in said action. Attorney Raines appeared in that action on behalf of Harris by filing a demurrer to the complaint therein. That action was thereafter dismissed by the plaintiff. Thereafter and on or about January 10, 1927, attorney Raines received the following letter from Mr. Stafford, attorney for the plaintiff in the action:

"Mr. Joseph M. Raines Jan. 10, 1927
Attorney at Law
Fairfield, California
Dear Sir:

I received a copy of your demurrer in the matter of Colthurst v. Harris.

Subsequent to the commencement of the action in Solano County, I commenced an action in Napa County where the accident occurred and accordingly I have dismissed the Solano action and enclose you a copy of the same.

Very truly yours,
Harry I. Stafford."

The enclosure mentioned in the above letter was a copy of the dismissal of the Solano County action.

Following the dismissal of the Solano County action and on December 21, 1926, said Muriel E. Colthurst, appellee herein, commenced a new action in the Superior Court of Napa County, California, against Harris for damages for the personal injuries above mentioned. The new action thus commenced by Miss Colthurst embodied the same cause of action set forth by her in her Solano County action which had been dismissed. On December 30, 1926, Harris

was personally served in San Diego County, California, with complaint and summons in the new action, that is, the Napa County action. Harris failed to file an appearance in the Napa County action within the time provided by law and on February 3, 1927, his default was duly taken and entered therein; and on May 9, 1927, judgment was rendered against him in said action and in favor of plaintiff therein, Muriel E. Colthurst, in the sum of $10,000, together with costs in the sum of $7. That judgment has become final, and is now wholly unsatisfied and unpaid.

The assured, John Harris, failed and neglected until May 12, 1927, that is, until after judgment had been rendered against him in said action, to forward or turn over to appellant herein the complaint or summons which had been served upon him in said action, or to notify appellant of the service upon him of complaint or summons. Neither appellant, nor any of its agents or representatives, nor Attorney Raines, ever received until May 12, 1927, any copy of the complaint or summons thus served on Harris or any notice of the service upon him of said complaint or summons.

By the terms of the policy of insurance, issued by the appellant to Harris, it is provided that the insurance and the policy are subject to certain conditions stated in the policy, one of the conditions being as follows:

> "Written notice of any accident with the most complete information obtainable at the time must be forwarded to the Home Office of the Com-

pany, or to an authorized representative as soon as is reasonably possible. Notice given by or on behalf of the Assured to any authorized agent of the Company with particulars sufficient to identify the Assured shall be deemed to be notice to the Company, and failure to give any notice hereinbefore required shall not invalidate any claim made by the Assured, unless it shall be shown not to have been reasonably possible to give such notice within prescribed time, and that notice thereof, *and if suits are brought to enforce such a claim, the Assured shall immediately forward to the Company every summons, or other process as soon as same shall have been served on him.*" (Italics ours.)

On May 12, 1927, appellant herein notified Harris in writing that he had committed a breach of one of the essential conditions of the policy, that is, that he had failed to forward to appellant the complaint or summons served upon him in the Napa County action in compliance with the provisions of the policy, and that therefore he had forfeited his rights under the policy; and by its notice appellant disclaimed and ever since has continuously disclaimed all liability under the policy.

Following the judgment taken against Harris in said action, Harris on his own account and entirely at his own expense engaged the services of Attorney Joseph Raines for the purpose of setting aside the default and judgment entered against him and for the purpose of acting as his attorney in said action. Acting through attorney Raines, Harris made a timely motion to set aside the default and judgment. On September 12, 1927, the motion was denied for the

reason that it had not been brought to the attention of the court within a period of six months from the date of judgment therein. Appellant herein never participated in said action at any time or in any way and the employment of Attorney Raines by Harris in said action was made and done solely by Harris on his own behalf and was not made, done or participated in by appellant.

As a part of said agreed statement of facts two exhibits were received in evidence by the court at the time of the trial. These exhibits were as follows:

> The judgment roll in the action brought by appellee herein against Harris in the Superior Court of Napa County, California, said judgment roll being marked Plaintiff's Exhibit 1.
>
> The policy of insurance issued by appellant to Harris; said policy being marked Plaintiff's Exhibit No. 2.

These exhibits were not included in the bill of exceptions, but the originals thereof have been transmitted to this court by an order of the court below. The matters contained in the judgment roll of the Napa County action (Plaintiff's Exhibit 1) are set forth in the above statement of facts and therefore the exhibit is not printed in the transcript of record herein. The insurance policy (Plaintiff's Exhibit 2) appears in the printed transcript of record herein, pages 42 et seq.

An Act of the Legislature of the State of California approved May 21, 1919, and found at Statutes of California of 1919, page 776, was introduced in evidence upon the trial herein as a part of the agreed

statement of facts and deemed read; this Act provides as follows (omitting inapplicable portions):

> "*Action against insurance carrier when insured is insolvent. Exhibit of policy.* No policy of insurance against loss or damage resulting from accident to, or injury suffered by another person and for which the person injured is liable other than a policy of insurance under the workmen's compensation, insurance and safety act of 1917 or any subsequent act on the same subject, or against loss or damage to property caused by horses or other draught animals or any vehicle, and for which loss or damage the person insured is liable, shall be issued or delivered to any person in this state by any domestic or foreign insurance company, authorized to do business in this state, *unless there shall be contained within such policy a provision that the insolvency or bankruptcy of the person insured shall not release the insurance carrier from the payment of damages for injury sustained or loss occasioned during the life of such policy and stating that in case judgment shall be secured against the insured in an action brought by the injured person * * * then an action may be brought against the company, on the policy and subject to its terms and limitations, by such injured person * * * to recover on said judgment.*" (Italics ours.)

The provision in the policy of appellant with regard to the injured person's right of action varied somewhat from the requirements of the California statute above quoted. The law is, however, that the provisions of the statute are deemed a part of the policy in the same manner as if they were exactly reproduced in the policy; hence the variance is immaterial.

Upon the above agreed statement of facts, the trial court rendered judgment in favor of plaintiff Muriel E. Colthurst (appellee herein) and against defendant Metropolitan Casualty Insurance Company of New York (appellant herein) in the sum of $5000 together with interest thereon at the rate of 7% from May 9, 1927, and costs of suit, which judgment was entered by the Clerk of the Court below on April 1, 1929. Thereafter appellant filed a written exception to said judgment, which exception was allowed by the court below. The exception and order allowing the same appear at pages 14 and 15 of the transcript of record.

ARGUMENT.

The specifications of error relied upon by appellant are two. They are as follows:

"I.

That the judgment in said action is not supported or sustained by the facts in said case as agreed upon between the parties in said action, in this, to wit: That it definitely appears from said agreed facts that John Harris, the assured in the policy of insurance sued on herein, breached and failed to perform a material condition of said policy, thus rendering said policy void as to him and defeating all of his rights under said policy, and that the rights of plaintiff herein under said policy are no greater than those of said assured; that said failure of performance and said breach by said John Harris of a material condition of said policy consisted in this, to wit: That said John Harris failed to forward according to the terms of said policy to said Metropolitan Casualty Insurance Com-

pany of New York, defendant herein, the summons served upon him in the action brought by plaintiff above named against him for damages for personal injuries arising out of the use, maintenance and operation of the automobile of said John Harris, and that said John Harris failed according to the terms of said policy to notify said Metropolitan Casualty Insurance Company of New York of said service upon him of said summons.

II.

That the judgment in said action is not supported or sustained by the agreed facts in said case in this, to wit: That it definitely appears from said agreed facts that Metropolitan Casualty Insurance Company of New York, defendant herein, did not receive until the 12th day of May, 1927, the summons, or any copy thereof, served upon John Harris, the assured in the policy of insurance sued on herein, in the action brought against him by plaintiff herein in the county of Napa, State of California, and that said Metropolitan Casualty Insurance Company of New York, defendant herein, did not receive until said 12th day of May, 1927, any notice of the service upon said John Harris of said summons."

As revealed by the above specifications of error, there is but one point involved in this appeal, which may be briefly stated thus:

Harris, the assured, had no rights under the policy because he breached a material condition of the policy in failing until after judgment had been taken against him, to forward to appellant the summons served upon him in the Napa County action. (Error No. 2 above set forth is merely cumulative in that it sets out that in addition to Harris's failure to notify appellant of the service of summons upon him, appellant re-

ceived no notice thereof from any other source.) The question is therefore whether Miss Colthurst, the injured person, has any rights under the policy greater than those of Harris, the assured. We submit that she has not; that she stands in the shoes of the assured and that therefore she has no greater rights against the appellant than the assured would have. As a consequence, it is appellant's contention that the judgment of the court below was not sustained by the facts of the case and our argument will be limited to that point.

Appellant's contentions may be divided into the following three propositions:

I.

The provision in the policy requiring immediate forwarding to appellant of summons and other process as soon as served on the assured is a vital provision, compliance with which is essential to the rights of the assured under the policy.

II.

The letter from appellee's attorney to Attorney Raines did not operate to fulfill the terms of the policy with regard to the forwarding of the summons and process.

III.

In view of the law and of the provisions of the policy, the rights of the appellee are no greater than those of the assured, and the failure of the assured to notify appellant of the service of process upon him precludes any liability under the policy in favor of either the assured or appellee.

These three propositions will be taken up in the order above stated.

I.

THE PROVISION IN THE POLICY REQUIRING IMMEDIATE FORWARDING TO APPELLANT OF SUMMONS AND OTHER PROCESS AS SOON AS SERVED ON THE ASSURED IS A VITAL PROVISION, COMPLIANCE WITH WHICH IS ESSENTIAL TO THE RIGHTS OF THE ASSURED UNDER THE POLICY.

Ann. Cas. 1914-B 412, Note;

Travelers Ins. Co. v. Meyers & Co., 62 Ohio St. 529, 57 N. E. 458;

U. S. Casualty Co. v. Breese (Ohio), 153 N. E. 206;

National Co. v. U. S. Fidelity etc. Co., 94 N. Y. S. 457;

National etc. Co. v. Travelers Ins. Co. (Mass.), 57 N. E. 350;

London etc. Co. v. Siwy (Ind.), 66 N. E. 481;

Riddlesbarger v. Ins. Co., 7 Wall. 390;

Underwood etc. Co. v. London etc. Co. (Wis.), 75 N. W. 996.

This principle is thoroughly established by the authorities above cited and inasmuch as the principle was undisputed by appellee in the briefs filed in the lower court, no further comment will be made herein upon this point.

II.

THE LETTER FROM APPELLEE'S ATTORNEY TO ATTORNEY RAINES DID NOT OPERATE TO FULFILL THE TERMS OF THE POLICY WITH REGARD TO THE FORWARDING OF THE SUMMONS AND PROCESS.

The letter referred to is as follows:

"Mr. Joseph M. Raines Jan. 10, 1927
Attorney at Law
Fairfield, California
Dear Sir:

I received a copy of your demurrer in the matter of Colthurst v. Harris.

Subsequent to the commencement of the action in Solano County, I commenced an action in Napa County where the accident occurred and accordingly I have dismissed the Solano action and enclose you a copy of the same.

Very truly yours,
Harry I. Stafford."

Upon the trial of this action, counsel for appellee contended that the above letter operated to satisfy the condition of the policy requiring the forwarding of process to appellant. In their brief in the trial court, counsel for appellee cited no cases in support of their contention to that effect and indeed no case could be found which would support it. The requirement that process be forwarded to the insurance company as soon as served is one separate and distinct from the requirement of notice of any claim made against the assured. A claim may be made or an action commenced without prosecution thereof by the injured person and without service of complaint and summons thereunder. It is one thing for the insurance company to learn that a claim has been made or that an action has been commenced and it

is another thing of a great deal more consequence to learn that the complaint and summons have been served, necessitating an appearance in the action. The letter from appellee's counsel constituted advice or notice only of the commencement of the action and contains no reference to or notice of service of process, which is the vital thing.

III.

IN VIEW OF THE LAW AND OF THE PROVISIONS OF THE POLICY, THE RIGHTS OF THE APPELLEE ARE NO GREATER THAN THOSE OF THE ASSURED, AND THE FAILURE OF THE ASSURED TO NOTIFY APPELLANT OF THE SERVICE OF PROCESS UPON HIM PRECLUDES ANY LIABILITY UNDER THE POLICY IN FAVOR OF EITHER THE ASSURED OR APPELLEE.

It should first be borne in mind that in California the rights of an injured person against the insurance company are defined by the California Statute (Statutes of 1919, page 776), which provides that policies of insurance of the type involved in the case at bar must contain:

> "a provision that the insolvency or bankruptcy of the person insured shall not release the insurance carrier from the payment of damages for injuries sustained or loss occasioned during the life of such policy and stating that in case judgment shall be secured against the insured in an action brought by the injured person * * * then an action may be brought against the company, on the policy and subject to its terms and limitations, by such injured person * * * to recover on said judgment."

In the case of *Malmgren v. S. W. Ins. Co.,* 201 Cal. 29, it has been held that the above statute must be considered in law as a part of every insurance policy issued by an insurance company within the State of California and the rights of an injured person under a policy issued in the State of California are therefore to be determined by reference to the terms of the above statute rather than by reference to the terms contained in the policy itself if the terminology of the policy deviates from the statute. As will be hereinafter noted, there are some deviations between the terms of the policy in the case at bar and the provisions of the California statute but these deviations need not be here considered, for in view of the Malmgren decision, the question involved in the case at bar is to be determined as if the provision of the statute had been exactly reproduced in the terms of the policy.

The question of the rights within the State of California of an injured person against an insurance company where the assured has violated some material provision of the policy has recently been settled in this jurisdiction by the decision of this Honorable Court in the case of *Georgia Casualty Company v. Boyd* (No. 5708, Dec. filed July 29, 1929). In that case the insurance company issued to one Dr. Jarvis in California, a physician's liability insurance policy for $5000. In his application for the policy, Dr. Jarvis represented that no claim had been paid by him for damages on account of alleged error or mistake or malpractice on his part. After the issuance of the policy, one Miss Boyd obtained a judg-

ment against Jarvis in the amount of $5000, as damages for malpractice during the term of the policy. The judgment remained unsatisfied and Miss Boyd brought an action against the insurance company under the applicable statute of California above referred to. After the act had occurred which caused the injury to Miss Boyd, the insurance company had rescinded the policy which had been issued to Jarvis on the ground of a material misrepresentation of Jarvis contained in his application for the policy. Miss Boyd obtained a judgment from the insurance company in the United States District Court in the amount of the judgment which she had previously obtained against Jarvis. The insurance company appealed from the judgment against it and by the decision of this honorable court, the judgment of the United States District Court was reversed. The ground for the reversal is contained in the following excerpt from the opinion of the Court of Appeals:

> "The contention most vigorously urged for appellee is that though the rescission may have operated to cut off any right Dr. Jarvis would otherwise have had, as to her it was wholly ineffective for any purpose. Her reasoning is that under the California statute above quoted the policy is, in effect, a tri-party contract, that her right accrued upon the happening of her injury, and that nothing done thereafter without her consent could operate to divest her of that right. She cites Malmgren v. S. W. etc. Ins. Co., 201 Cal. 29; Pigg v. International Indemnity Co., 86 Cal. App. 671; Finkelberg v. Cont. Cas. Co., 219 Pac. 12; Metropolitan Cas. Co. v. Albritton, 282 S. W. 187; Slavens v. Standard Accident Co., 27 Fed. (2d) 859. But admittedly no decided case is directly in point, and hence we do not

> stop to analyze or distinguish the citations. Appellee's position would be tenable in the case of a valid contract of insurance, *but it is quite incredible that the legislature, even were its power to be granted, intended to vest in a third person, who parted with no consideration, a right superior to that of the assured himself, or to give validity in favor of such third person to an instrument void as between the parties thereto.* It may be conceded that after an injury has been suffered, neither by agreement nor otherwise could the parties to the policy deprive the injured person of the benefit thereof, but as already suggested, the right of the third person presupposes the existence of a valid policy. *The manifest purpose of the statute is to give the injured person the same footing the insured would have, had the latter paid the judgment for damages. In the one case, as well as the other, the defense of invalidity is open to the insured."* (Italics ours.)

From the language of this honorable court in the above case of *Georgia Casualty Co. v. Boyd,* it is thus seen that the rights of an injured person against the insurance company are, under the California statute, no greater than those of the assured, this court having expressly stated that:

> *"The manifest purpose of the statute is to give the injured person the same footing the insured would have, had the latter paid the judgment for damages."* (Italics ours.)

An examination of the California statute reveals that this is the only possible interpretation which can be drawn from it. The statute could not be more explicit in indicating that the rights of the injured person are subject to all of the defenses which might be urged against the assured himself. The statute provides that—

> "In case judgment shall be secured against the insured in an action brought by the injured person * * * then an action may be brought against the company, *on the policy and subject to its terms and limitations,* by such injured person * * * to recover on said judgment."

What could the phrase "on the policy and subject to its terms and limitations" mean if it did not refer to the *conditions* of the policy? The policy of insurance is a contract between the assured and the insurance company. The contract contains certain terms, conditions and limitations. These terms, conditions and limitations include the amount of the premium, the amount of the policy, the period during which the policy is to remain in force, the limitations as to the risks insured against, conditions with regard to notice of claims, forwarding of process, cooperation by the assured, etc. There is nothing in the statute which indicates that by the use of the term "on the policy and subject to its terms and limitations" is meant only some of the terms, conditions and limitations and not others. If it were intended that by the use of the words in the statute "terms and limitations" the legislature meant anything less than *all* of the terms and limitations of of the policy, there would be no conceivable criterion for determining which of the terms and limitations were meant to be included and which to be excluded. Behind the explicit terms of the statute, definite and unequivocal as they are, appears very clearly the intention of the legislature. It is not compulsory in the State of California for the operator of an automobile to carry liability insurance. It is

plain that by the statute in question the legislature of California has provided that *if* the operator of an automobile carries liability insurance and *if* the policy is in full force and effect at the time any judgment is obtained against him by an injured person (namely if at that time the assured has fulfilled all of the terms of the policy with reference to representations, payment of premium, notice to the insurance company of any accident, etc.) the injured person shall then have a right of action against the insurance company to recover on such judgment. The injured person has paid no consideration for this right and it is not a right which exists independently of statute. It is indeed very questionable whether the legislature could constitutionally grant to an injured person a right of recovery against the insurance company independently of any right of recovery existing in the assured. Be that as it may, the legislature has attempted to grant no such right. It has simply provided that in case there is any liability whatsoever existing against the insurance company at the time the injured person has procured his judgment against the assured, then and in such event only the injured person may proceed against the insurance company. To hold that the insurance company is liable to the injured person in all cases in which it has issued a policy to an automobile owner, regardless of the terms and limitations of the policy and of any liability to the assured, would be so grossly unreasonable that even in the case of an ambiguous statute it would be necessary for the court, if possible, to adopt a construction which would avoid such

a consequence. In view of the explicit and unambiguous terms of the statute, however, the court is faced with no such task of construction. The statute is clear that the right of the injured person is dependent upon the fulfillment of the terms and limitations of the policy; and one of those terms or limitations is that there shall be no liability on the part of the insurance company in the event of the failure by the assured to promptly forward to the insurance company all process served upon him in relation to any claim coming within the risks insured against.

That this question is settled in this jurisdiction by the decision of the court in *Georgia Casualty Company v. Boyd* is obvious in view of the facts of the case and of the language of the court in its decision. In view of the contentions of counsel for appellee in the case at bar upon the trial thereof, it may be safely anticipated, however, that counsel will seek a reversal in the case at bar of the principle laid down by this court in *Georgia Casualty Company v. Boyd,* and inasmuch as appellant herein will have no opportunity to file a closing brief, the other decisions dealing with this question will here be reviewed.

A thorough examination of the authorities in this country dealing with the question of the rights of an injured person against an insurance company where the assured has violated some material provision of the policy has revealed that the prevailing doctrine is in accord with that laid down by this court in *Georgia Casualty Co. v. Boyd,* that is, that the in-

jured person stands in the same position as the assured, and that where the assured has forfeited his rights under the policy by reason of a violation of some material provision thereof, the injured person is likewise without remedy against the insurance company.

The leading cases dealing with this question and in which the prevailing doctrine has been adopted, are as follows:

Pigg v. International Ind. Co., 86 Cal. App. 671;

Bryson v. International Ind. Co., 55 Cal. App. Dec. 87;

Roth v. National Casualty Co., 195 N. Y. S. 865;

Schoenfeld v. N. J. etc. Ins. Co., 197 N. Y. S. 608;

Miller v. Union Indemnity Co., 204 N. Y. S. 730;

Coleman v. New Amsterdam Co., 213 N. Y. S. 532;

Schroeder v. Columbia Cas. Co., 213 N. Y. S. 649;

Hermance v. Globe Co., 223 N. Y. S. 93;

U. S. Casualty Co. v. Breese (Ohio), 153 N. E. 206.

Two of the cases above cited are decisions of the District Court of Appeal of the State of California. An examination of these two cases plainly reveals that the rule in California is that the injured person stands in the shoes of the assured in reference to a right of action against the insurance company.

Pigg v. International Ind. Co., 86 Cal. App. 671:

This was an action brought against an insurance company by an injured person to recover a balance due on judgment procured against the assured. The insurance company set up as a defense that the assured failed to cooperate with it in that he left the country before the trial of the action against him. The lower court found this defense to be untrue,—apparently upon the theory that the assured, a foreigner, was not sufficiently advised by the insurer that his presence would be needed at the trial. The Appellate Court, after a detailed discussion of the facts in reference to the trial court's finding, decided that the finding was supported by the evidence. From the fact that the finding was considered upon its merits the inference may be drawn that the defense of the assured's failure to cooperate may be raised, in California, by the insurer against the injured person.

Bryson v. International Ind. Co., 55 Cal. App. Dec. 87:

This was an action brought against the insurer by the holder of a judgment against the insolvent assured. The insurer set up as a defense that at the time of the accident the plaintiff was being transported by the assured for an implied consideration and that therefore the injury was not one covered by the policy. The court said:

> "Had the insured paid the amount of the judgment it would have been conclusive in his favor against the company on every issue properly

tried in the action against him, he having notified the company of the action and requested it to defend the same. (Civ. Code, Sec. 2778, subdiv. 5.) Since the policy provides for an action on such a judgment by the injured person against the company, under the circumstances stated, *the evident intent is that such person shall have the rights which the insolvent insured would have had if he had paid the judgment.* Such a judgment is conclusive only in respect to the matters adjudged. No one would contend that it precludes the company from defending on the ground that it did not issue the alleged policy or that the policy issued by it does not cover the motor vehicle which caused the injury. It seems equally clear that the company may show in defense that its policy does not indemnify against liability for damage to persons of the class to which the injured person belongs. In other words, before the company can be held liable as an indemnitor it must be proved that it is an indemnitor. 'While one who is required to protect another from liability is bound by the result of the litigation to which such other is a party, provided the former had notice of such litigation, and an opportunity to control its proceedings, a judgment against a party indemnified is conclusive in a suit against his indemnitor only as to the facts thereby established. The estoppel created by the first judgment cannot be extended beyond the issues necessarily determined by it.' (14 R. C. L. 62; 31 C. J. 461; Pezel v. Yerex, 56 Cal. App. 304, 309.) (Italics ours.)

The remainder of the authorities above cited are decisions of the courts of New York and of Ohio. Reference to a few of these cases will reveal that the holding in those states is the same as that indicated by the California cases above considered.

Roth v. National Casualty Co., 195 N. Y. S. 865:

This was an action brought by an injured person against an insurance company under an automobile liability policy. In compliance with Section 109 of the Insurance Law of New York the policy contained a provision which is identical with the one in the policy of appellant in regard to the injured person's right of action against the insurer, namely, that in case of insolvency of the assured such action may be brought by the injured person "under the terms of the policy." There was question in this case whether the assured failed to cooperate with the insurance company after the accident. *As incidental to that question the query arose whether such a defense is available to the insurance company in an action brought by the injured person.* The latter query was gone into very thoroughly by the court and the court held that the phrase "under the terms of the policy" gave the insurance company in an action brought against it by the injured person all the defenses which it might have urged against the assured. The main opinion was written by Justice Greenbaum and concurred in by Justice Dowling. Justice Greenbaum said in part:

> "The sole issue was whether the assured failed to cooperate with the company, and whether such failure was a non-compliance with one of the terms of the policy, which would have barred a recovery by him against the company, and hence would be a bar to a recovery by the plaintiff in this action.
>
> (1) The question thus arises: What is the meaning of the words 'under the terms of the

> policy,' in the clause above quoted? The respondent contends that they refer only to 'the risks insured against by the terms of the policy, and when according to the terms of the policy it was in force at the time of the accident.' The appellant insists that they refer to every term of the policy which is obligatory upon the policy holder, and which, if the assured violated, would bar recovery by him, and hence by the injured person suing under the policy. It seems to us that the Legislature did not intend to deprive the insurance company of any defenses which it could have properly urged against the assured under the provisions of the policy, had he brought an action thereon." (pages 866-867.)

The evidence as to lack of cooperation was then considered and the court held that there was no such lack of cooperation as would constitute a breach of the policy; the judgment against the insurance company was therefore affirmed. A dissenting opinion was written by Justice Laughlin and concurred in by Presiding Justice Clarke, the opinion of the dissenting Justices being that there was sufficient evidence to establish the fact of a material lack of cooperation by the assured. The dissenting opinion, however, approved the construction placed upon the statute with regard to the injured person's right of action against the insurance company, the opinion stating:

> "As I view the statute, the Legislature intended, in such case, to give a cause of action to the person injured or the personal representative of the decedent against the insurance company *on the policy,* provided the assured could have recovered thereon for any liability enforced against him and covered by the policy."

It is true that Justice Smith, who concurred in the *judgment* of the court, took a contrary view of the *statute*. He said:

> "I concur in the result. I do not think that the failure of the insured to cooperate after the accident, not induced by plaintiff, constitutes a defense. To hold otherwise puts the plaintiff at the mercy of the owner, who is presumptively hostile. This was not intended by the statute."

The construction adopted by Justice Smith, however, is overcome by the united opinion of the other four Justices, as set forth above with regard to this matter.

The majority opinion in the *Roth* case, as above indicated, has been followed in all the subsequent New York decisions on this matter.

Schoenfeld v. New Jersey Etc. Ins. Co., 197 N. Y. S. 608:

This was another case of failure of the assured to cooperate with the insurer after an automobile accident. The action was brought by the injured person against the assured, judgment had and execution returned unsatisfied. Thereatfer suit was brought by the injured person against the insurance company who set up the defense of the assured's failure to cooperate. The New York court again considered Section 109 of the Insurance Law and the corresponding provision in the policy and held that the defense of failure to cooperate was available to the insurer. This case contains another thorough discussion of the point, at the conclusion of which the court said:

> *"I can see nothing in the statute showing a legislative intent to deprive the company of this defense, or to create any other or different liability to the injured party than that which the policy gave to the assured.* On the contrary, the intention was that, at the time when a right of action accrued to the injured party under the provision of Section 109 of the Insurance Law (Consol. Laws, c. 28), to justify a recovery from the company upon the judgment, the policy *must then be in force.* It is clear from the language of that section that the liability of the company to the injured party does not accrue until an execution issued upon the judgment obtained against the assured has been returned unsatisfied by reason of insolvency or bankruptcy. Insolvency or bankruptcy is the test upon which the right of action depends, and the time when that insolvency or bankruptcy is to be determined is when the execution is returned unsatisfied. If, prior to that time, therefore, the assured had violated the terms and conditions of the policy in such manner as to entitle the company to cancel it, pursuant to its provisions, no right of action would survive to the injured party." (Italics ours.)

It should be noted (and the fact was pointed out by appellee at the trial of the case at bar) that the California statute differs from the New York statute in this: The New York law requires the policy to contain a provision that the insolvency or bankruptcy of the assured shall not release the insurance carrier from the payment of damages for injuries sustained or loss occasioned during the life of the policy and that *in case execution against the assured is returned unsatisfied* because of such insolvency or bankruptcy in an action brought by the injured person then an action may be maintained by the injured person against the insur-

ance company under the terms of the policy for the amount of the judgment in the said action not exceeding the amount of the policy.

The California statute on the other hand does not require that an execution shall have been returned unsatisfied. The California statute *does* require, however, that a judgment shall have been secured by the injured person against the assured as a prerequisite to the maintenance of an action against the insurance company. The policy issued by the appellant in this case is obviously drawn in conformity with the New York, rather than with the California statute. The policy of appellant provides as follows (Tr. p. 68):

> "(5) THE INSOLVENCY OR BANKRUPTCY of the Assured hereunder shall not release the Company from the payment of damages for injuries sustained or loss occasioned during the life of this policy, and in case execution against the Assured is returned unsatisfied because of such insolvency or bankruptcy in an action brought by the injured or his or her personal representative in case death results from the accident, then an action may be maintained by the injured person or his or her personal representative against the Company under the terms of the policy for the amount of the judgment in the said action, not exceeding the amount of the policy."

It is conceded, of course, that the policy in this case must conform to the California law and that the rights of the appellee hereunder are to be determined in view of the California, rather than the New York statute. The distinction between the two statutes is, however, insignificant and immaterial with regard to the point here being raised; for, granting that it is not neces-

sary in California that an execution be returned unsatisfied, nevertheless it *is* necessary that a *judgment shall have been procured* against the assured before an action may be maintained against the insurance company. At the trial appellee contended that the liability of the insurance company to the injured person accrues in final and conclusive form at the time of the accident or injury, and that nothing which the assured may do after that time can affect that liability. The error of that contention appears very plainly from an inspection of the California statute which provides that a judgment must have been procured against the assured before an action may be brought against the insurance company. The *Schoenfeld* case above cited remains therefore an authority on this question despite the difference between the two statutes. The *Schoenfeld* case holds that the liability of the insurance company to the injured person does not accrue until the execution has been returned unsatisfied and that to justify a recovery from the company upon the judgment the policy *must be in force* at that time. Applying that authority to the situation arising under the California law, the principle may be stated as follows: That the liability of the insurance company to the injured person does not accrue until a *judgment has been obtained* and that to justify a recovery on such judgment the policy must have been in force at the time the judgment was obtained. In citing the New York authorities we are not, therefore, relying on the narrower New York statute.

There is another distinction between the New York and the California statutes. By virtue of this dis-

tinction the California statute is of the two the more favorable to the insurance company. The New York statute provides that an action may be brought "under the terms of the policy." The language of the California statute in this respect is "on the policy and *subject to its terms and limitations.*" In other words, the California statute, in considering the rights of the injured person, is explicit in its reference to the limitations of the policy with regard to liability thereunder.

Hermance v. Globe Idemnity Co., 223 N. Y. S. 93, 97:

In this case the court, in adhering to the above rule. said:

> "The owner of an automobile is not required to procure liability insurance. When he does so it is for his own protection. The rights which an injured party has under the statute against the company are no greater than those which the assured possesses. Such is the logical reasoning of the cases above cited."

U. S. Casualty Co. v. Breese (Ohio), 153 N. E. 206:

This was an action brought against the insurer by an injured person who had previously procured a judgment against the assured, on which an execution had been returned unsatisfied. The policy contained the same provision as in the above cases, namely, that the injured person might maintain an action against the insurer "under the terms of the policy." The court held that failure of the assured to notify the insurer of service of process upon him constituted a good defense to the action brought by the injured.

Commenting upon the phrase "under the terms of the policy," the court said:

> "It will thus be seen that the city ordinance explicitly makes the right of recovery dependent upon the terms of the policy of insurance held by the operator of the motor bus. * * * From the fact that the injured party, Martha Breese, has no rights in this case except such as arise under the policy, construed in connection with the legislation authorizing it, the conclusion necessarily follows that she has no greater rights against the insurance company than were held by Joe Zurawski, the assured. * * *."

From the above authorities, it is clear, therefore, that this principle that the injured person has no greater rights than the assured has been adopted by this Circuit of the United States Court of Appeals, by the Courts of California, New York and Ohio. It is our contention that the doctrine is not only the only one which can be drawn from a reading of the statute, but that it has also been settled by the above precedents. Upon the trial of this case, however, counsel for appellee relied upon a few decisions which contain language apparently conflicting with the holding in the cases above cited. Inasmuch as it may be anticipated that counsel for appellee will rely upon the same decision upon this appeal, we will briefly review the same. The decisions are as follows:

Malmgren v. Southwestern Automobile Ins. Co., 201 Cal. 29;

Marple v. American Automobile Ins. Co., 82 Cal. App. 137;

Kruger v. California Highway Indemnity Exchange, 201 Cal. 672;

Finkelberg v. Continental Cas. Co., 126 Wash. 543, 219 Pac. 12;

Metropolitan Cas. Ins. Co. v. Albritton (Ky.), 282 S. W. 187;

Slavens v. Standard Acc. Ins. Co., 27 Fed. (2d) 859.

An examination of these cases will reveal that in each of them either there was no conflict with the doctrine above referred to or the facts differentiated the case from the case at bar in so far as the principle here in question is concerned. The cases will be taken up in the above order.

Malmgren v. Southwestern Automobile Ins. Co., 201 Cal. 29:

A great deal of stress was laid upon the above case by counsel for appellee at the trial of the case at bar, but the effect of the decision is frankly conceded by appellant herein, namely, that the California statute in reference to policies of this kind is considered in law a part of the policy and that the requirements of the statute may not be deviated from by any insurance company operating in California. The appellant in the case at bar is an insurance company whose Home Office is located in New York State and whose business is conducted throughout the nation. It has obviously drawn its policy in conformity with the law in New York State. As a result of the Malmgren decision and of the sound doctrine recited therein, the policy of the appellant herein must conform to the California law with regard to insurance written by it in this state and where the policy deviates from the requirements of the California law, it must be read

and construed as if the California law had been expressly incorporated therein. As hereinabove pointed out, however, the deviation between the policy in the case at bar and the California statute with regard to the necessity of the injured person's having procured an unsatisfied execution under the judgment against the assured is immaterial to the present inquiry and does not in any way affect or reduce the weight of the authority of the New York decisions dealing with this question.

Counsel for appellee in the case at bar are the same attorneys who acted as counsel for appellee in the case of *Georgia Casualty Company v. Boyd.* In the trial of the case at bar, they made the same contention as that asserted by them in resisting the appeal of Georgia Casualty Company in the case of *Georgia Casualty Company v. Boyd,* namely that there is language in the Malmgren decision to the effect that such an insurance policy is a tri-party contract, the three parties being the insurance company, the assured and the injured person; that the necessary consequence of this language is that the right of action against the insurance company accrues to the third party, the injured person, at the time of the injury. This does not follow. The original insurance policy may be a tri-party contract, but the rights of the third party and any cause of action which may exist in favor of such third party depend upon several conditions and limitations, namely, those contained in the policy of insurance. Even apart from the matter of the forwarding of all process by the assured, there is the limitation or condition embodied both in the

statute and in the policy that the injured person must have procured a judgment against the assured before he can bring an action against the insurance company. It is evident therefore that the liability of the insurance company to the injured person, although it may have its inception in the accident or incurring of the injury, does not accrue as a legal right of action against the insurance company until the procuring of the judgment against the assured.

Marple v. American Automobile Ins. Co., 82 Cal. App. 137:

This case merely holds that in an action by an injured person against the insurance company the plaintiff is not required to allege and prove the insolvency of the insured. The reason for this holding is that the statute is conjunctive; that is, it requires the policy to contain "a provision that insolvency * * * shall not release * * * *and* stating that in case judgment shall be secured * * * then an action may be brought * * *." As a matter of fact this case illustrates the point which we have hereinabove made, namely, that the right of action of the injured person against the insurance company depends upon and arises out of the *judgment* which such injured person has procured against the assured. As already indicated, the liability of the defendant herein had become extinguished by the time the judgment was procured by the appellee herein.

Kruger v. California Highway Ind. Exchange, 201 Cal. 672:

This was an action brought by an injured person against an insurance company upon a liability policy

issued to a jitney bus driver. The plaintiff had procured a default judgment against the driver, upon which execution had been returned unsatisfied. The insurance company defended upon the ground that the assured had failed to notify it of the action brought against him. The court held that the defense was not a good one and that the policy created a primary liability in favor of the injured person. The case is, however, plainly distinguishable from the case at bar in that by the policy in the *Kruger* case the insurer guaranteed directly to the injured person the payment of any judgment which such injured person might procure against the assured. The provision in the policy is as follows: "It is hereby understood and agreed that in the event a final judgment covering any loss or claim under this policy is rendered against the subscriber the agent guarantees the payment of said judgment direct to the plaintiff securing said judgment, irrespective of any financial responsibility on the part of the subscriber." It is obvious that by the above provision there was intended to be created a liability in favor of the injured person independent of the relations between the insurer and the assured. No such intention can be inferred from the wording of the policy of appellant. Another fact distinguishing the *Kruger* case from the case at bar is that the policy in the *Kruger* case was required by law to be secured by all persons driving jitney busses in the city of San Francisco before they could procure a license to operate said busses. The law governing this matter was an ordinance of the City and County of San Francisco known as the "Jitney Bus Ordi-

nance." The ordinance required that "said policy shall guarantee payment of any final judgment rendered against the said owner or leases of said jitney bus *irrespective of the financial responsibility or any act or omission* of said jitney bus owner or lessee." (Italics ours.)

In commenting on this language the Supreme Court said:

> "It would be difficult to frame language more simple or direct than this language. It can have but one meaning, and that is that appellant guaranteed the payment to the party securing the same of any judgment rendered against Delaney and covering any loss or claim under said policy. * * * Appellant's liability was to pay the judgment, and in a contract of that character the promisor is bound by the judgment whether he have notice of the action or not, even though he is not a party thereto. * * * 'There can be no doubt that where a surety undertakes for the principal, that the principal shall do a specific act, to be ascertained in a given way, as that he will pay a judgment, that the judgment is conclusive against the surety; for the obligation is express that the principal will do this thing, and the judgment is conclusive of the fact and extent of the obligation. As the surety in such cases stipulates without regard to notice to him of the proceedings to obtain the judgment, his liability is, of course, independent of any such fact'."

Owing to the provision in the policy and of the ordinance above referred to it is plain that the liability of the insurance company in the above case amounted to a pure guarantee of payment of the judgment and therefore, of course, the court was obliged to hold that once the judgment had been pro-

cured the insurance company was bound to pay the same regardless of any question of the merits or of notice to the insurance company from the assured. The ordinance was designed, of course, to protect the general public against reckless and unskillful driving. To accomplish this purpose it was necessary to impose a liability upon the insurance company, which liability would exist without reference to any conditions or limitations in the policy other than the amount thereof. On the other hand, the assured in the case at bar was not required to purchase liability insurance. In respect of the assured in this case the law simply provides that if an insurance company does grant him insurance and a judgment is procured against him by an injured person, an action may be maintained by such injured person against the insurance company *"on the policy and subject to its terms and limitations."* The law in this case does not impose upon the insurance company the relation of *guarantor* but simply provides that an action may be maintained subject to the terms and limitations of the policy. The distinction between the relation of guarantor under the Jitney Bus Ordinance and that of an ordinary indemnity policy such as that written by the insurance company in this case is a vital one in so far as the question in this case is concerned, and the decision in the *Kruger* case is, therefore, in no way decisive of the case at bar.

Finkelberg v. Continental Cas. Co., 126 Wash. 543; 219 Pac. 12:

This was an action brought by an injured person against the insurer, the plaintiff having first procured

a judgment against the assured, and an execution having been returned unsatisfied. The policy contained the customary provisions regarding the duty of the assured to forward all process, and stipulating that in case of insolvency of the assured the injured person might maintain an action against the insurer under the terms of the policy. The insurer defended upon the ground that the insured had failed to notify it of the pendency of the action against him; also on the ground that two days before that action was commenced a written agreement had been entered into between the insurer and the assured cancelling the policy. By the terms of the written agreement, the assured, for consideration of $850, released the insurer from all liability under the policy and particularly with reference to the accident to the plaintiff. In the injured's action against the insurer the court held that the plaintiff's demurrer to the answer should have been sustained. The court stated:

> "It is the contention of respondent that it should not be forced to pay the judgment of appellant, for the reason that it had not been notified of the pendency of the action according to the terms of the policy providing for notice to be given to respondent. The policy did not provide for the appellant to give notice to respondent. By the settlement with respondent, Tanaka was not required to give notice, and if he were so required and failed to give notice this would not in any wise affect the rights of appellant. He could neither destroy the rights of appellant by his agreement with respondent nor by his neglect to give notice to respondent."

There are several factors distinguishing the above case from the case at bar.

In the first place the policy in the *Finkelberg* case provided that no action could be brought against the insurer unless the loss should have been fixed by a final judgment against the assured in a court of last resort. The policy then provided:

> "The company shall be bound, however, as to such final judgment, not exceeding the limits of the policy, to pay and satisfy such judgment and to protect the assured against the levy of any execution issued upon the same."

Just as in *Kruger v. California Highway Ind. Exchange,* supra, the court obviously construed this provision as creating a liability in favor of the injured person, independent of the insurer's obligation to the assured. There is no such provision in the policy of appellant.

In the second place the policy in the *Finkelberg* suit contained a provision permitting the injured person who had procured a judgment and an unsatisfied execution against the assured to maintain an action against the insurance company "under the terms of the policy." The provision in the California law with regard to this cause in the policy is as hereinabove pointed out more explicitly framed with a view to render available to the insurance company the defense of any breach of the conditions of the policy, the California law reciting that the action may be brought *"on the policy and subject to its terms and limitations."*

In the third place there was obvious collusion between Tanaka, the assured, and the insurance company in the *Finkelberg* case, for after the accident occurred Tanaka and the insurance company entered

into an agreement attempting to cancel the policy, the agreement explicitly referring to any liability arising out of the accident to the injured person involved in that suit. The merits of the case, therefore, were strongly against the insurance company and in view of those merits it is not at all surprising that the court should have taken the position it did.

Metropolitan Cas. Ins. Co. v. Albritton (Ky.), 282 S. W. 187:

This was an action brought against the insurance company by injured persons who had previously procured a judgment against the assured on which an execution had been returned unsatisfied. The insurance company set up the defense that the assured failed to cooperate. The lower court sustained a demurrer to the paragraph of the answer in which the above defense was set up. This ruling was sustained by the upper court, which said:

> "The excerpt above, taken from the policy, conferring a right of action upon the injured person against the company (defendant), in case of insolvency or bankruptcy of assured, was a stipulation for the exclusive benefit of such injured person, and it thereby created, under the policy, a dual obligation to the company in the event of the conditions named—one to the damaged person because of the accident growing out of either personal injuries or property lost, and the other to the assured—and those obligations, when they arose under the policy, were totally independent of each other. Neither the assured by anything he might do could defeat plaintiff's cause of action under that clause, and likewise nothing they might do could defeat his right of action when it accrued by his paying the judgments against him."

An examination of the opinion in the above case indicates that the language above quoted was merely dictum. The suits in which the judgments were procured against the assured were tried on their merits, the defense being actively conducted by the insurance company and there was no showing that the defense was in any way prejudiced or weakened by the assured's alleged failure to cooperate. The court therefore said immediately following the language above quoted:

> "Besides, it is doubtful if the results would be different if we construed the policy to unify in every particular the rights of the damaged person and those of the assured, without a showing that the failure to render the stipulated assistance resulted in judgments against him. No such pretense is made in the case, either by pleading or proof, nor is it attempted to be shown that any fact material to the defense of the suits against Mimms was omitted or undeveloped on those trials. But, be those facts as they may, there can be no doubt about the correctness of our interpretation of the policy, and the court did not err in its ruling in sustaining the demurrer to the second paragraph of the answer as pleaded."

The decision in the case was plainly dictated by the merits. The insurance company had actively defended the actions brought against the assured. It would therefore have been estopped to raise the point of failure of the assured to cooperate. Besides, as indicated by the opinion, there was no showing of prejudice to it by reason of the alleged failure to cooperate. The plaintiff in that case was, therefore, entitled to a judgment against the insurance company on undisputed and well established principles of law, and

there was no necessity for the court to attempt to lay down a rule which was in conflict wtih the overwhelming weight of authority on this matter.

Slavens v. Standard Acc. Ins. Co., 27 Fed. (2d) 859:

In the above case the complaint alleged that a policy of automobile insurance was issued to one Ernst, the policy covering any person or persons riding in or legally operating said automobile; that the plaintiff in the case was injured while riding in the automobile with one Weinsheimer who was then operating the automobile with the consent of the owner, Ernst; that plaintiff brought an action against Weinsheimer for plaintiff's injuries; that immediately thereafter plaintiff gave written notice of the action to the insurance company and delivered to both the insurance company and to Ernst copies of the summons and complaint; that both the insurance company and Ernst neglected to defend the action; that before commencing the action the plaintiff had delivered to both the insurance company and to Ernst a notice containing fullest information concerning the accident and of plaintiff's claim; that immediately after the occurrence of the accident Ernst had also given to the insurance company a written notice of the accident and of plaintiff's claim; also, that immediately after the commencement of the action Ernst gave to the insurance company a copy of the summons and complaint; that plaintiff recovered a judgment against Weinsheimer; that thereafter the plaintiff caused execution to be issued and gave notice thereof to the

insurance company; and that execution was returned unsatisfied.

The insurance company demurred to the complaint on the ground, among others, that Weinsheimer failed to give the insurance company the requisite notice as required by the policy. In other words, the insurance company had received from both the injured person and the owner of the automobile all the notice to which it was entitled (notice of the claim, of the action, of service of process, and of the judgment), but it endeavored to make a point of the fact that notice had not come from the proper party, namely, from Weinsheimer, who was one of the persons insured and the person against whom the claim was being made.

The court first considers whether the policy was one of indemnity against *actual loss* or against *liability for loss,* and held that it was one against liability for loss. The court then says:

> "The question arises whether Weinsheimer's failure to give the defendant notice of the accident immediately after its occurrence, with the fullest information obtainable, and full particulars of any claim made against him on account thereof, is fatal to the right of the plaintiff herein to recover on a complaint which alleges that all the prescribed information so stipulated for was promptly furnished by both the plaintiff and by Ernst. In fire and life insurance it is generally held that a stipulation in the policy as to the person by whom notice is to be given is of the essence of the contract. (Citing cases.) But exceptions are recognized in cases where notice and proofs of loss are made by 'the real party in interest,' although he is not the named assured, but his rights are such that he is held to be the assured within the meaning of the policy, as in

Watertown Ins. Co. v. G. & B. S. M. Co., 41 Mich. 131, 1 N. W. 961, 32 Am. St. Rep. 146; Milwaukee Mechanics' Ins. Co. v. Brown, 3 Kan. App. 225, 44 P. 35; and Alezumas v. Granite State Fire Ins. Co., 111 Me. 171, 88 A. 413.

"We think that the plaintiff herein is a beneficiary of the insurance policy and a real party in interest, and that his compliance with the condition of the policy as to prompt notice and information was sufficient to authorize him to bring the present action, and that he could not be deprived of his rights under the policy by Weinsheimer's neglect or failure to act. The policy recognizes the plaintiff's right to sue upon the policy in providing that 'the insolvency or bankruptcy of the assured shall not release the company from the payment of damages for injuries sustained or loss occasioned during the policy period. In the event of the assured being unable to satisfy judgment against him, the injured person, or his heirs or personal representatives, in case of death resulting from an accident, shall have the right of action against the company, subject to the terms and limitations of this policy, to recover the amount of said judgment.' Ordinarily the beneficiaries of an indemnity contract may maintain an action on the contract, though not named therein, when it appears by fair and reasonable intendment that their rights and interests were in the contemplation of the parties, and were being provided for at the time of making the contract. (Citing cases.)"

After referring to the cases of *Finkelberg v. Continental Casualty Co.* and *Metropolitan Cas. Ins. Co. v. Albritton,* the court then states:

"The case at bar is not a case of entire absence of notice to the insurer, as in Travelers' Insurance Co. v. Myers & Co., 62 Ohio St. 529, 57 N. E. 458, 49 L. R. A. 760, and other cases cited by the defendant, in which it was held that the stipula-

> tion as to notice was of the essence of the contract. Here the plaintiff, as well as Ernst, who paid the premium for the insurance, furnished the defendant all the information that could have been given it by Weinsheimer, and no ground is seen for holding the notice and information insufficient, or that Weinsheimer's inaction affected substantial rights of the defendant."

It is obvious therefore that the decision in the *Slavens* case was based upon the fact that the insurance company received all the notice to which it was entitled and that its contention that the notice had not come from the proper person was hypertechnical and a mere quibble.

CONCLUSION.

This completes a review of all of the authorities on this question which a thorough examination of the decisions in this country has disclosed. Appellant respectfully contends that the review of these authorities reveals:

1. That the question has been settled in this court by the decision of this court in the case of *Georgia Casualty Company v. Boyd.*

2. That even if it should be conceded that the holding in the *Finkelberg* case and in the other cases relied upon by appellee is in conflict with the doctrine adopted by this court in *Georgia Casualty Company v. Boyd,* the prevailing doctrine is that adopted in *Georgia Casualty Company v. Boyd* and in the decisions hereinabove considered of the courts of California, New York and Ohio.

3. That none of the cases relied upon by counsel for appellee at the trial hereof is in point with the case at bar and that each of them is plainly differentiated from the case at bar in reference to the point here under consideration.

4. That the prevailing doctrine represents the only reasonable construction of the statute for, as stated by this court in the case of *Georgia Casualty Company v. Boyd*,—

> "it is quite incredible that the legislature, even were its power to be granted, intended to vest in a third person, who parted with no consideration, a right superior to that of the assured himself, or to give validity in favor of such third person to an instrument void as between the parties thereto * * *. The manifest purpose of the statute is to give the injured person the same footing the insured would have, had the latter paid the judgment for damages."

It is respectfully submitted, therefore, that the judgment should be reversed.

Dated, San Francisco,
October 14, 1929.

Respectfully submitted,
BRONSON, BRONSON & SLAVEN,
Attorneys for Appellant.

H. R. MCKINNON,
Of Counsel.

No. 5823

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK (a corporation),
Appellant,

vs.

MURIEL E. COLTHURST,
Appellee.

BRIEF FOR APPELLEE.

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FOREWORD.

This cause was tried upon an agreed statement of facts as set forth in the transcript of the record (pages 18 to 25 inclusive) and again in appellant's brief (pages 4 to 9 inclusive). Appellee will not further encumber the record by again setting forth said facts; those items which are necessary to our argument will be referred to therein.

CONTENTIONS.

The appellee contends:

1. That under the policy and the California Statute (Stats. 1919, page 776) here involved, the injured person, when forced to sue the insurer, to realize on

his judgment against the negligent insured, does not stand in a like position to the insured, bringing a suit on the policy against his insurer and hence a defense that the insured failed to perform a condition subsequent cannot be asserted by the insurer against the injured person.

2. That in view of the undisputed facts in this matter an affirmation of the judgment is dictated by the merits.

ARGUMENT.

I.

WE CONTEND THAT THIS STATUTE DEPRIVES THE INSURANCE COMPANY OF THE DEFENSE IT IS ATTEMPTING TO SET UP; NOT ONLY IN EXPRESS TERMS BUT ALSO BY VIRTUE OF THE INTENT THAT IS BEHIND IT.

The practical benefit of this statute would be nil if the insured could cancel or rescind the policy on the ground that a condition subsequent had not been performed and thereby leave the injured person without any recourse. This cannot be done under the statute for it would permit the insured and the insurer to do the very thing the statute strikes at.

Justice Smith in *Roth v. National Casualty Company*, 195 N. Y. S. 865, in speaking of the similar New York Statute expresses what we consider to be the purpose of the California Statute:

> "I do not think that the failure of the insured to co-operate after the accident, not induced by plaintiff, constitutes a defense. To hold otherwise puts the plaintiff at the mercy of the owner, who is presumptively hostile. This was not intended by the statute."

The appellee is proceeding in this action upon the contract right conferred upon her by statute.

Malmgren v. S. W. Ins. Co., 201 Cal. 29.

The rights of the injured person under the policy of insurance and the California Statute accrue at the time of the injury and the liability of the company to the injured person cannot be affected by any subsequent action taken as between the insurer and the insured.

Georgia Casualty Co. v. Boyd, 34 Fed. (2d) 116;

Finkelberg v. Continental Cas. Co., 126 Wash. 543, 219 Pac. 12;

Slavens v. Standard Acc. Ins. Co., 27 Fed. (2d) 859;

Metropolitan Cas. Ins. Co. v. Albritton, 214 Ky. 16, 282 S. W. 187;

Fentress v. Rutledge, 140 Va. 685, 125 S. E. 668.

In the case of *Marple v. Am. Auto Ins. Co.,* 82 Cal. App. 137, we find the California Court holding that under this statute an injured person may sue the insurer directly he obtains a judgment against the insured and that it is not a condition precedent to said action that the insured be insolvent or bankrupt. A holding which is clearly contra to the construction of the New York Statute under the authorities cited by appellant.

The Supreme Court of Washington in the absence of a statute, but under a similar state of facts as is caused by statute in California, and which in the particular case was brought about by provisions in the

policy, held in the case of *Finkelberg v. Continental Casualty Company, supra,* that a failure of the insured to perform a condition subsequent could not be raised by the insurer as a defense in an action on the policy brought by the injured party.

The State of Kentucky in the case of *Metropolitan Casualty Insurance Company v. Albritton,* 282 S. W. 187 took the same attitude and refused to allow the insurer to escape liability to the injured party by raising collateral matters.

To this contention the Court replied at page 188:

> "The excerpt above, taken from the policy, conferring a right of action upon the injured person against the company (defendant), in case of insolvency or bankruptcy of assured, was a stipulation for the exclusive benefit of such injured person, and it thereby created, under the policy, a dual obligation to the company in the event of the conditions named—one to the damaged person because of the accident growing out of either personal injuries or property lost, and the other to the assured—and those obligations when they arose under the policy, were totally independent of each other. Neither the assured by anything he might do could defeat plaintiff's cause of action under that clause, and likewise nothing they might do could defeat his right of action when it accrued by his paying the judgments against him."

These decisions are controlling even though there was an absence of statute in each of the jurisdictions referred to. The policies contained provisions which created the same obligations that would be created in California in insurance policies in the absence of said provisions.

That the presence or absence of a statute makes no difference in the rule is held in the case of *A. Rose & Son, Inc. v. Zurich General Accident and Liability Company,* 145 Atl. 813:

> "While automobile public liability insurance is of recent origin, we hold its beneficiary clause is no different in legal effect from that of the ordinary life insurance or mortgage insurance contract. It has been so held in other jurisdictions where the question has been presented, whether under a statute, or where no such statute exists. See Finkelberg v. Continental Casualty Co., 126 Wash. 543, 219 P. 12; Parker v. London Guarantee & Accident Co., U. S. Dist. Ct., E. D. Pa., March Term, 1926, No. 12218; Merchant's Mutual Ins. Co. v. Smart, 267 U. S. 126, 45 S. Ct. 320, 69 L. Ed. 538."

Appellant in its opening and supplemental briefs has collected a great mass of authority tending to establish its point that under the California Statute and the provisions of its policy the rights of the appellee are no greater than those of the insured and any defense that might be urged against the insured by the insurer may be urged against the appellee.

Foremost among the authorities cited by appellant are the New York authorities, which cannot be questioned and do support appellant's position but they do not determine nor can they determine the construction to be placed on the California Statute; nor can those authorities determine the construction that shall be given to the terms of the policy itself in this jurisdiction.

The California Courts are thoroughly familiar with the New York statute and the interpretation that has

been put thereon and has refused to follow blindly the path that has been blazed in the decisions of the New York Courts. The independent attitude of the California Courts and their belief that the California Statute is to be interpreted to apply to California conditions is denoted first in their expressions in the case of *Malmgren v. S. W. Insurance Company,* 201 Cal. 29, wherein it was urged upon the California Court that the California Statute was modeled after the New York Statute and so the same rules of construction should be applied. In answer the Court states at page 34:

> "Schoenfeld v. New Jersey Fidelity & Plate Glass Ins. Co., 203 App. Div. 796 (197 N. Y. Supp. 606), relied upon as an authority in the instant case, is merely declaratory of the New York statute, which provides that a cause of action does not accrue to the injured person until an execution issued upon the judgment against the assured has been returned unsatisfied by reason of insolvency or bankruptcy. No such language or language equivalent thereto is found in the statute of this state and neither appellant nor this court is given authority to interpolate the provision of the New York law into a California statute."

It was also urged in the *Malmgren* case that there was no contractual relation between an injured person and the insurance company under policies written under the statute—the reply to this was:

> "The provisions of the statutes are, as a proposition of law, a part of every policy of indemnity issued by a company or corporation engaged in transacting the kind of indemnity insurance business which appellant was authorized by the law of the state to transact. It was a contractual

> relation created by statute which inured to the benefit of any and every person who might be negligently injured by the assured as completely as if such injured person had been specifically named in the policy."

This language is important and is to be especially noted in consideration of the question whether or not the California Statute is to be construed in like manner as the New York decision. You can search the New York decisions thru and you will not find any authority to the effect that under their statute the relation between the injured party and the insurer is a contractual one.

In support of its contention the appellant cites *Pigg v. International Indemnity Company,* 86 Cal. App. 671. It is clearly not in point. We find nothing in the opinion stating that the statute saves to the insurer all defenses that it could urge against the insured. The point for which the case is cited was never presented to the California Court; it never arose, for there was an utter lack of proof of no cooperation, which was being urged as the defense, to the action.

The other California case of *Bryson v. International Indemnity Company,* 55 C. A. D. 87, certainly does not aid appellant's position. The only question decided there was that unless the policy covers the risk the insurer cannot be held by the injured person. An entirely different situation than the present where it is admitted that the policy covered the risk and was in full force and effect at the time of the accident and up to the 12th of May, 1927.

The appellant sees in the case of *Georgia Casualty Company v. Boyd, supra,* recently decided by this Court, the answer to this entire argument. It is true that we who represent the appellee, were also attorneys for the appellee in that matter, and we sincerely feel that we are better qualified than others to speak concerning the judgment in that matter.

This Court will recall that the case there presented was one *where the policy was void from the beginning,* the liability of the insurer to the insured had never attached and so your honors said:

> "Appellee's position would be tenable in the case of a valid contract of insurance, but it is quite incredible that the legislature, even were its power to be granted, intended to vest in a third person, who parted with no consideration, a right superior to that of the assured himself, or to give validity in favor of such third person to an instrument void as between the parties thereto. *It may be conceded that after an injury has been suffered, neither by agreement nor otherwise could the parties to the policy deprive the injured person of the benefit thereof, but as already suggested, the right of the third person presupposes the existence of a valid policy.* The manifest purpose of the statute is to give the injured person the same footing the insured would have, had the latter paid the judgment for damages. *In the one case, as well as the other, the defense of invalidity is open to the insured.*"

Here, of course, we have no such situation, the policy was valid at all times and in full force and effect.

This case comes clearly within the line of the "conceded situations" in which the injured person is

entitled to recover. The decision in *Georgia Casualty Insurance Company v. Boyd,* rather than supporting the appellant's case in any particular is entirely for the position of appellee.

As we have stated, the New York decisions, followed by Ohio and certain other jurisdictions show that those jurisdictions do not consider that it was intended to deprive the insurance company of any defenses it might have under the policy. However, this view was not so clear to the New York Court as may be seen by a reference to the *Roth* case, 195 N. Y. S. 865, the case of first impression in New York. In that case five Justices sat, and there are three expressions of opinion; one Justice concurred in the result to make the majority opinion, and two of the Justices filed a dissenting opinion. The case is not the satisfactory authority for appellant's position that it claims, however, a subsequent decision by another Court of like jurisdiction did determine the matter so far as New York was concerned; this was the *Schoenfeld* case, 197 N. Y. S. 606, and in the opinion therein, the *Roth* case was referred to and it is said that the *Roth* case did not determine the questions as to the defenses which the insurance company might urge against the injured party. So we see that even in New York it was not the clear cut question appellant's counsel would have us believe; they hesitated there as to which course they would pursue. The authorities, we cite, show that other states have chosen the other construction and we have conclusively proved to this Court that California is indicating that it will follow the line of decisions which

hold that these statutes and provisions are for the benefit of the injured party and that the injured person is not to be deprived of the benefit of the insurance by any act *subsequent* to his injury between the assured and the insurer.

II.

THE APPELLEE IS, IRRESPECTIVE OF THE CONSTRUCTION OF THE STATUTE, AND A DECISION UPON WHICH IS NOT NECESSARY TO THE DETERMINATION OF THIS CAUSE, ENTITLED TO AN AFFIRMATION OF THE JUDGMENT.

Our authorities for this statement are the following cases:

Finkelberg v. Continental Casualty Company, 126 Wash. 543, 219 Pac. 12;

Metropolitan Casualty Insurance Co. v. Albritton, 214 Ky. 16, 282 S. W. 187;

Slavens v. Standard Acc. Insurance Company, 27 Fed. (2nd) 859.

At the outset, it must be admitted that all the terms and provisions in the policy are binding upon the parties thereto, except in so far as they may be inconsistent with special statutory requirements of the jurisdiction wherein the policy is written.

The situation here is not involved. The appellant issued its policy to Harris; he injured the appellee; Harris notified the appellant; told them all about the accident; the appellee sued Harris, who was served and Harris immediately sent the summons and complaint to appellant; the appellant employed Raines to defend Harris, made him their agent for them-

selves and Harris on account of the litigation growing out of the injury; thereafter Stafford, the attorney for the appellee wrote Raines the important letter of January 10, 1927, to-wit:

> "Mr. Joseph M. Raines January 10th, 1927.
> Attorney at Law
> Fairfield, California
> Dear Sir:
>
> I received a copy of your demurrer in the matter of Colthurst v. Harris.
>
> Subsequent to the commencement of the action in Solano County, I commenced an action in Napa County where the accident occurred and accordingly, I have dismissed the Solano action and enclose you a copy of the same.
>
> Very truly yours,
> Harry I. Stafford."

Raines received the letter and sat back, never notified Harris that the Solano County action had been dismissed and the same action commenced in Napa County. The appellant, of course, is charged with notice of this state of affairs for such knowledge was imparted to their agent Raines in the course of his duties for appellant. The appellant equalled Raines in laxness and the next step was the judgment against Harris on which this suit is based.

Harris was notified of the entry of the judgment in the Napa action by appellee; he informed the appellant, who thereupon wrote him that it denied liability under the policy on the ground that he had failed to forward it the papers in the Napa action, thus violating a condition of the policy and releasing appellant from its contract.

Appellee under the foregoing recital of facts, is certainly entitled to judgment. The merits of this case are decidedly in her favor, to the point of being one sided and the appellant is estopped to raise any defense against her.

The appellant knew everything about the accident that could possibly be known. It undertook the defense of Harris in the Solano County action and was fully informed as to the dismissal of that action and the commencement of the like action in the adjacent Napa County. The appellant's agent was negligent and lax and now the appellant is reduced in its ill-becoming desire to avoid its obligation, to the old situation of the pot calling the kettle black.

Appellant's position is clear—it says, "I didn't do my duty, but neither did Harris do his, so let the injured party suffer."

But Harris did do his duty, and more than that, the appellee through her attorney, gave them sufficient notice to charge them in this case.

Subdivision 1 of Paragraph B of the policy states:

> "Written notice of any accident with the most complete information obtainable at the time must be forwarded to the Home Office of the Company, or to an authorized representative as soon as is reasonably possible. Notice given by or on behalf of the Assured to any authorized agent of the Company with particulars sufficient to identify the Assured shall be deemed to be notice to the company and failure to give any notice hereinbefore required shall not invalidate any claim made by the Assured, unless it shall be shown not to have been reasonably possible to give such notice within prescribed time, and that notice

thereof, and if suits are brought to enforce such a claim, the Assured shall immediately forward to the Company every summons, or other process as soon as same shall have been served on him." (Tr. p. 70.)

We think that paragraph taken as a whole belies appellant's attitude in this matter. The appellant is relying on the very last clause in said subdivision, but it, of course, must be construed in the light of the whole division.

Appellee is of the opinion that the complete notice of the accident to appellant, the forwarding of the original Solano County suit, the notice by appellee to appellant of the commencement of the Napa County suit and the dismissal of the original action added to the appellant's failure of duty more than fulfills the requirements of the provision of the policy as to notice and if any damage has been suffered by appellant, the same is due to its own dereliction.

The cases we cite support this theory:

Slavens v. Standard Acc. Insurance Co. (*supra*), decided by this Court is without doubt the counterpart of this action. There the defendant company had issued an automobile indemnity policy to one, Ernst. The plaintiff was injured while one, Weinsheimer was operating Ernst's car with his permission. Ernst gave notice of the accident immediately to the company and of plaintiff's claim. Plaintiff sued Weinsheimer and served Ernst who turned the summons and complaint over to the insurance company. Plaintiff also notified the company of the action.

Practically all of the authority cited by appellant is merely cumulative of the one point that appellant should be allowed to assert any defense it has against its insured against the appellee and these decisions are not in point when we consider that the real question to be decided in this case is, did or did not the appellant have sufficient notice to charge it under its policy.

There is no doubt in our mind that it did and that *Slavens v. Stand. Acc. Insurance Company, supra,* completely supports that theory.

Of all appellant's authority there is only one case that has any appearance of bearing upon this question, but even it fades under a close scrutiny. That is the case of *Miller v. Metropolitan Casualty Ins. Company of New York,* 146 Atl. 412, where there was a failure to forward the summons and complaint. The case is clearly distinguishable upon its facts from the present case as well as the *Slavens* case. In the *Miller* case the insurance company had notice of the accident and no more; in the *Slavens* case it had notice of the accident, summons and complaint; and in this case the insurance company had notice of the accident, summons and complaint and notice from appellee.

We could find stronger language but none more applicable to the present case than appellant's own statement in regard to the *Slavens* case:

> "the fact was that the insurance company received all the notice to which it was entitled, and that its contention that the notice had not come from the proper person was hypertechnical and a mere quibble."

CONCLUSION.

The construction to be given the California Statute is to be governed by the intent manifested by the legislature in its enactment and the expressions of the California Courts in respect thereto. The New York authorities are not controlling, nor are they in point for although there is a similarity of language in the New York and California Statutes, they are fundamentally different in effect and outlook.

The California Statute creates a privity of contract between the injured person and the insurer; it does not require proof of the insolvency or bankruptcy of the insured and it does not require the return of an execution unsatisfied before suit can be maintained against the insurer. Any one of which differences call for an interpretation entirely opposed to the New York view.

We are convinced that under the California Statute the failure of the insured to perform conditions subsequent cannot be made a defense to an action brought on the policy by the injured party.

Regardless of the foregoing question, we submit that by reason of the facts in this case, a decision on the construction to be given the California Statute is unnecessary. That the situation presented merely requires a ruling as to the sufficiency of the notice given appellant and if, under the circumstances, it complied with the requirements of the policy and the law.

In our opinion, there was more than ample notice to appellant, for even though the insured may have failed to forward the summons and complaint in the

Napa County action, still appellant knew that the action had been commenced and was pending, and was fully informed of appellee's claims and charges through the forwarding of the complaint and summons in the Solano County action and the letter to its agent of January 10th, 1927, from the appellee.

We submit that the authorities of this jurisdiction fully support that opinion and that the judgment should be affirmed.

Dated, San Francisco,
November 23, 1929.

Respectfully submitted,
HARRY I. STAFFORD,
DANIEL R. SHOEMAKER,
Attorneys for Appellee.

No. 5823

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK (a corporation),
Appellant,

vs.

MURIEL E. COLTHURST,
Appellee.

SUPPLEMENTAL BRIEF FOR APPELLANT.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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Since the filing of appellant's brief herein, appellant has discovered a few recent decisions dealing with the question of whether the rights of an injured person, in an action against an insurance company under a liability policy, are any greater than those of the assured. These decisions bear out the contention of appellant herein, that is, that the rights of an injured person under such a policy are no greater than those of the assured. By leave of court, therefore, appellant files this supplemental brief embodying the authorities mentioned. The cases are:

Miller v. Metropolitan Cas. Ins. Co. of N. Y., (R. I., decided June 7, 1929) 146 Atl. 412;

Stacey v. Fidelity & Casualty Co. of N. Y., 114 Ohio St. 633, 151 N. E. 718;

Metropolitan Casualty Ins. Co. of N. Y. v. Blue, (Ala., decided March 21, 1929) 121 So. 25;

Rohlf v. Great American Mut. Ind. Co., 27 Ohio App. 208, 161 N. E. 232;

Weiss v. N. J. etc. Ins. Co., 228 N. Y. S. 314;

Lundblad v. New Amsterdam Cas. Co., (Mass.) 163 N. E. 874;

Lorando v. Gethro, 228 Mass. 181, 117 N. E. 185, 1 A. L. R. 1374;

Indemnity Ins. Co. v. Davis' Adm'r., 150 Va. 778, 143 S. E. 328.

The following excerpts from the opinion of the courts in the above cases indicate the decisions contained therein and the principle adopted.

Miller v. Metropolitan Cas. Ins. Co. of N. Y., (R. I., decided June 7, 1929) 146 Atl. 412:

This case involved an action brought against an insurance company for property damage caused by the operation of an automobile of the assured. The policy, which was the common type of indemnity policy, provided for the giving of immediate notice of accident by the assured to the insurance company and the immediate forwarding to the insurance company of any process or summons. The evidence showed that notice of the *accident* was immediately given to the insurance company. The insurance company knew nothing, however, of the commencement of any legal proceedings against the assured until informed by plaintiff's attorney that suit had been

brought and judgment obtained by default when the attorney presented an execution showing return unsatisfied and demanded payment of the judgment by the insurance company. The action was brought against the insurance company under G. L. 1928, c. 258, Sec. 7 of R. I. The Rhode Island Statute referred to provided as follows:

> "Every policy hereafter written insuring against liability for property damage * * * shall contain provisions to the effect that the insurer shall be directly liable to the injured party * * * to pay him the amount of damages for which such insured is liable. Such injured party, * * * in his suit against the insured, shall not join the insurer as a defendant. If, however, the officer serving any process against the insured shall return said process 'non est inventus,' the said injured party, * * * may proceed directly against the insurer. Said injured party * * * after having obtained judgment against the insured alone, may proceed on said judgment in a separate action against said insurer: * * * provided, * * * that in no case shall the insurer be liable for damages beyond the amount of the face of the policy. All policies made for the insurance against liability described in this section shall be deemed to be made subject to the provisions hereof, and all provisions of such policies inconsistent herewith shall be void."

The insurance company's plea set up that the policy contained a condition which had been broken and denied liability. Plaintiff replied that the terms of the policy were immaterial and that the condition had not been broken.

The court held that the statute only gave the injured person the right to stand in the place of the

assured and left the insurer free to contest liability under the policy. In its opinion the court said:

> "In construing the statute the right given to the injured person and the obligation undertaken by the insurance company should both be protected if possible. *The aim of the statute as to the injured person was not to place him in a more advantageous position than that of the insured. It was to subrogate him to the right which the insured would have had if he had paid the judgment.* Lundblad v. New Amsterdam Cas. Co., (Mass.) 163 N. E. 874. It was to enable collection to be made from the indemnitor, even if the insured had not been found or had not after recovery of a judgment paid the same. In this respect the statute would enlarge the scope of a policy which contained no such provision. It would create a privity of contract which otherwise would not exist. *At the same time it left the ultimate recovery by the injured person subject to the contractual rights created by the policy. It did not seek to impose a new basis of indemnity not contracted for by the insurance company.*
>
> *"To construe the statute as giving plaintiff an action of debt on the judgment against the insured, obtained without knowledge of the insurance company, would not only impose a new burden upon the insurance company, but totally deprive it of its day in court and opportunity to defend the original case on the merits as provided by the policy. Such construction would be opposed to principles underlying our administration of justice, even if not violative of the constitutional guaranty of due process of law.* Whether the Legislature could pass an act imposing such an absolute liability without notice as a condition of allowing an insurance company to do business, we need not decide. The Legislature has not passed such an act. The provision of the act for nonjoinder of the insurance company in the first suit is clearly to protect the

> insurance company against the well-known tendency of jurors to fail to consider merits if a defendant in an automobile accident case is insured. It is not reasonable to suppose that the Legislature in one provision safeguarded the insurance company and in a following one imposed a liability without opportunity to know of or defend against the claim of an injured person. The portion of the statute allowing the injured party to 'proceed directly against the insurer' was applicable when a process against the insured was returned non est inventus. It did not make the judgment against the insured a final determination that the company was liable under the policy. It gave the right to the injured person to stand in the place of the insured, but left the insurance company free to contest liability under the policy." (Italics ours.)

The court also said:

> "The New York statute and the policy now before us express more clearly what we think our statute intended to do, viz., make plaintiff's rights 'subject to the terms, limits and conditions of the policy.' "

That is what the California statute provides. It provides that an action may be brought "on the policy *and subject to its terms and limitations.*" (Italics ours.)

Stacey v. Fidelity & Casualty Co. of N. Y., 114 Ohio St. 633, 151 N. E. 718:

This was an action by an injured person against an insurance company upon a judgment which had been procured against the assured. The insurance company defended on the ground of breach by the assured of conditions in the policy requiring notice of suit, forwarding of process, etc. The Ohio statute provides as follows:

"Section 9510—Subd. 3: Whenever a loss or damage occurs on account of a casualty covered by such contract of insurance, the liability of the insurance company shall become absolute, and the payment of said loss shall not depend upon the satisfaction by the assured of a final judgment against him for loss, or damage or death occasioned by such casualty.

Section 9510—Subd. 4: Upon the recovery of a final judgment * * * for loss or damage on account of bodily injury or death, if the defendant in such action was insured against loss or damage at the time when the right of action arose, the judgment creditor shall be entitled to have the insurance money provided for in the contract of insurance between the insurance company and the defendant applied to the satisfaction of the judgment, and if the judgment is not satisfied within thirty days after the date when it is rendered, the judgment creditor may proceed in a legal action against the defendant and the insurance company to reach and apply the insurance money to the satisfaction of the judgment."

The court first considers Section 9510-3 above quoted and the following language contained therein: "The liability of the insurance company shall become absolute, etc." and holds that the above clause does not mean that the insurance company is thereby deprived of all defenses, but that the word "absolute" means simply that the liability of the company shall become absolute in the sense of the latter part of the same sentence, namely, "that the payment of the loss is not dependent upon the satisfaction by the assured of a final judgment against him for a loss or damage or death occasioned by such casualty."

The court then considers Section 9510-4 and says:

"The provisions of section 9510-4, permitting legal action to be brought against the insurance company after judgment obtained against the assured, is more troublesome. In construing this language it is again the duty of the court to give to the statute such an interpretation as will prevent a declaration of unconstitutionality. Having already found that the conditions in the policy requiring notice were essential terms and conditions, and binding upon the assured, and it being apparent that those conditions were valuable to the insurance company, which materially affect the risk and facilitate the establishment of defenses to claims for damages, it is difficult to see upon what principle of law conditions binding upon the assured could be eliminated from the policy when claims are made by an injured party in a direct action.

"It does not appear in the instant case that there was any fraud or collusion between Stacey and Troyan, *but to permit a recovery in favor of the injured claimant, under circumstances where the assured would have no right to indemnity under his contract, would open the door to the unlimited exercise of fraud and collusion.* It is conceivable that accidents may occur hundreds of miles from the place where the insurance was written, and suit be brought where the possibility of notice and knowledge of the insurance company would be very remote. Even though the suit should be brought in the same jurisdiction where the policy is written, the insurance companies could not reasonably be required to be watchful of the dockets of the courts, and in any event the suit might be brought after the lapse of considerable time from the date of the injury, when all evidence which might have been obtained at an earlier date would have been lost. *There are so many conceivable reasons why the same defenses should be made against the injured party as against the assured that it requires no*

elaborate course of reasoning to reach the conclusion that any effort to place the injured person in a favored position, contrary to the terms of the policy contract, would be in contravention of the due process clauses of the state and federal Constitutions. Section 16, article I, of the Ohio Constitution, requires that 'all courts shall be open, and every person, for an injury done him in his land, goods, person or reputation, shall have remedy by due course of law,' etc. *It would be a strange measure of justice which would open the courts to a plaintiff and at the same time close them against a defendant who has a perfectly good defense. The reasonable interpretation to be put upon the language of section 9510-4 is that the injured party should be substituted for the assured and subrogated to all of his rights but only such rights as the assured might have been able to maintain against the insurance company when seeking to be indemnified."* (Italics ours.)

Metropolitan Casualty Ins. Co. of N. Y. v. Blue, (Ala., decided March 21, 1929) 121 So. 25:

This was an action brought against the Metropolitan Casualty Insurance Company by an injured person who had obtained a judgment against the assured. The policy was the customary automobile liability policy and contained the identical provision found in the policy of appellant in the case at bar to the effect that the insolvency of the assured should not release the insurance company and that in case execution against the assured should be returned unsatisfied an action might be maintained by the injured person against the insurance company under the terms of the policy for the amount of the judgment against the assured. In the above case the insurance company defended on the ground of lack

of co-operation by the assured; and the question therefore arose whether such a defense was available in an action brought by the injured person. The court held that the defense was available to the insurance company, and in that respect the court said:

> "The insolvency clause above copied extends the right of action to the injured party, only *under the terms of the policy.* The appellate courts of New York, Maryland, Ohio, and Maine have held that in a suit on a policy with such a clause, when the injured party is the plaintiff, the insurer may assert any defense which it could assert in a suit by the assured as plaintiff. Weiss v. N. J. F. & P. G. Ins. Co., supra; Schoenfeld v. New Jersey F. & P. G. Ins. Co., 203 App. Div. 796, 197 N. Y. S. 606; Roth v. Nat. Auto. M. C. Co., 202 App. Div. 667, 195 N. Y. S. 858; Coleman v. New Amsterdam C. Co., 126 Misc. Rep. 380, 213 N. Y. S. 522; Hermance v. Globe Indemnity Co., 221 App. Div. 394, 223 N. Y. S. 93; U. S. F. & G. Co. v. Williams, (Md.) supra; Rohlf v. Great Am. M. Ind. Co., 27 Ohio App. 208, 161 N. E. 232; Bassi v. Bassi, 165 Minn. 100, 205 N. W. 947. Whereas under the same circumstances, and construing a clause in the same language as that we are considering, the Court of Appeals of Kentucky held, in the case of Metropolitan Cas. Ins. Co. of N. Y. v. Albritton, 214 Ky. 16, 282 S. W. 187, that the injured party had a cause of action which could not be defeated by the assured.
>
> "It seems to us, however, in view of the language of the clause 5 (the insolvency proviso) that the injured party may maintain an action such as this *under the terms of the policy,* but that when the insurer is unable to make a defense, with the expectation of a fair presentation thereof, without the co-operation of the assured, a lack of co-operation without legal excuse or collusion, and in some material respect when

needed, and not waived by the insurer (Miller v. Union Indemnity Co., supra; N. Y. Con. R. Co. v. Mass. B. & Ins. Co., 193 App. Div. 438, 184 N. Y. S. 243; U. S. F. & G. Co. v. Williams, supra; Bradley v. Ill. Auto Ins. Co., 227 Ill. App. 572; 3 Blashfield Cyc. of Auto Law, p. 2654), should be and we hold is a good defense. There is no question of waiver presented on this appeal."

Rohlf v. Great American Mut. Indemnity Co., 27 Ohio App. 208, 161 N. E. 232:

This was an action brought by an injured person against an insurance company, after judgment had been procured against the assured. The insurance company defended on the ground of lack of co-operation by the assured. The court held the defense good, saying:

"Certainly the liability assumed by the company is limited by the terms of its policy, and Rohlf can have no greater right than Chapman himself had. The case must be determined against the plaintiff, because the assured is clearly shown to have violated the provisions of the policy requiring him to co-operate and assist in the defense. Schoenfeld v. New Jersey Fidelity & Plate Glass Ins. Co., 203 App. Div. 796, 197 N. Y. S. 606; Coleman v. New Amsterdam Casualty Co., 126 Misc. Rep. 380, 213 N. Y. S. 522; U. S. Fidelity & Guaranty Co. v. Williams, 148 Md. 289, 129 Atl. 660; Bassi v. Bassi, 165 Minn. 100, 205 N. W. 947; Oakland Motor Car Co. v. American Fidelity Co., 190 Mich. 74, 155 N. W. 729."

Weiss v. New Jersey etc. Ins. Co., 228 N. Y. S. 314:

This was an action brought by an injured person against an insurance company. The court said, in its opinion:

> "*Under the established rule* that any defense available to the insurance company against its assured can be asserted in an action of this character against the injured person, the letters offered in evidence upon the trial are admissible as against the assured, and accordingly are admitted in this action." (Italics ours.)
>
> *Lundblad v. New Amsterdam Cas. Co.,* (Mass.) 163 N. E. 874:

This case involved a statute of Rhode Island which provides:

> "Every policy hereafter written insuring against liability for property damage or personal injuries, or both, * * * shall contain provisions to the effect that the insurer shall be directly liable to the injured party * * * to pay him the amount of damages for which such insured is liable. Such injured party * * * after having obtained judgment against the insured alone, may proceed on said judgment in a separate action against said insurer."

The court in considering the above statute, said that it—

> "operates to subrogate the injured person to the rights of the insured defendant."
>
> *Lorando v. Gethro,* 228 Mass. 181, 117 N. E. 185, 1 A. L. R. 1374:

This was a suit brought by one who had recovered judgment for personal injuries against the principal defendant caused by his negligence and against an insurance company which had insured the principal against loss or damage arising from such cause. The Massachusetts statute provides:

> "In respect to every contract of insurance made between an insurance company and any

person, firm or corporation, by which such person, firm or corporation is insured against loss or damage on account of the bodily injury or death by accident of any person, for which loss or damage such person, firm or corporation is responsible, whenever a loss occurs on account of a casualty covered by such contract of insurance, the liability of the insurance company shall become absolute, and the payment of said loss shall not depend upon the satisfaction by the assured of a final judgment against him for loss, or damage, or death, occasioned by said casualty."

In commenting upon the above clause, "the liability of the insurance company shall become absolute," the court said:

"The clause following, namely, 'the liability of the insurance company shall become absolute,' in its context, means only that the liability of the insurance company, so far as concerns the amount of the loss, shall not thereafter be open to dispute. The insurer's liability is absolute only in respect of the amount of the loss and not in other respects. * * * Whatever may be their degree of financial responsibility, the clause does not mean that the other valid conditions of a contract of casualty insurance are abrogated. *Whatever conditions are imposed by that contract, whether as to written notice by the insured to the insurer of any accident and claim, the delivery to the insured of summons in case of action instituted, as to time of bringing action on the policy, or otherwise, are left in full force, unaffected by this clause.*

"This clause also leaves open for determination the question whether the policy of insurance covers the casualty in issue, or whether otherwise the insurer is liable to the assured. *It does not prohibit any ground of defense which ordinarily would be open to an insurer in an action brought against it by the assured on the policy.* It fore-

closes only the ground that the amount of the loss shall not be open to dispute. * * *

"*The contention is untenable that the words, 'the liability of the insurance company shall become absolute,' mean that the insurance company thereafter shall have no ground of defense open to it.* It is almost inconceivable that the legislature would attempt to make an insurance company unconditionally liable to pay for a loss without giving it an opportunity to require any notices of loss or of actions at law, and thus to ascertain the circumstances out of which the loss arises, and its nature and extent at or near the time when the event occurs, or to make reasonable conditions as to the establishment of its liability under the insurance contract. Such an intent on the part of the general court could not be inferred, in the absence of unequivocal words expressing that purpose so clearly as to be beyond discussion. A statute of such import would present a constitutional question quite different from those now at the bar. It would require unmistakable words to warrant the supposition that the legislature had pressed its power to such an extreme. The instant statute conveys no such meaning. All its words may be given an effective and natural interpretation without reaching so unusual a result." (Italics ours.)

Indemnity Ins. Co. v. Davis' Adm'r., 150 Va. 778, 143 S. E. 328:

This was an action against an insurance company brought by an administrator of a deceased person who had been killed by an automobile of the assured. There is a Virginia statute which is the same as the New York statute requiring the policy to contain a provision to the effect that the insolvency of the assured shall not relieve the insurance company of liability and that if a judgment is procured against the assured and an execution returned unsatisfied, an

action may be brought upon such judgment by the injured person against the insurance company under the terms of the policy. The policy in the above case contained such a provision. There is another Virginia statute which would authorize such an action as was brought in the above case against the insurance company; i. e. Section 5143 of the Code of 1919, relative to contracts made in whole or in part for the benefit of persons not parties to the contract. The insurance company defended on the ground of lack of co-operation by the assured, by reason of which the insurance company had disclaimed liability under the policy. The court said:

> "Whether the right of the administrator in the instant case to maintain this proceeding as plaintiff be rested upon the above statute, or upon the stipulation in the policy, or upon the provisions of section 5143 of the Code, he is seeking only to enforce compliance on the part of the company with the terms of its contract, and the issue between the parties is the same as it was upon the garnishee proceeding in Fentress v. Rutledge, supra; *and therefore the company could make any defense available to it in a suit by the assured.*" (Italics ours.)

When the above authorities are considered in addition to those cited in the brief of appellant heretofore filed in the case at bar, it is apparent that the overwhelming weight of authority is that the rights of an injured person against an insurance company are no greater than those of the assured. A variety of statutes relating to this liability of the insurance company to an injured person have now been considered and the conclusion of the courts of the various jurisdictions which have passed upon these statutes

is seen to be practically uniformly to the effect that the injured person stands in the shoes of the assured and has no greater rights than the assured might assert under the policy against the insurance company.

In *Miller v. Metropolitan Casualty Insurance Company,* (R. I.) 146 Atl. 412, first hereinabove cited, it is also directly held by the court that the provision in a policy that the insured must forward summons or other process as soon as served on him is a condition precedent to any right of action in him against the insurance company.

It is respectfully submitted therefore that Harris, the assured in the case at bar, having breached a material provision of the policy, his rights thereunder have been forfeited and that for that reason the suit of appellee, Muriel E. Colthurst, must likewise fail. As indicated by the brief of appellant heretofore filed herein, the few cases which seem to conflict with the rule as announced in the numerous decisions cited by appellant are plainly distinguishable from the case at bar upon the facts. It is submitted therefore that the case at bar is governed by the overwhelming weight of authority found in the decisions cited by appellant.

Dated, San Francisco,
November 6, 1929.

Respectfully submitted,
BRONSON, BRONSON & SLAVEN,
Attorneys for Appellant.

H. R. MCKINNON,
Of Counsel.

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No. 5823

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK (a corporation),

Appellant,

vs.

MURIEL E. COLTHURST,

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

HARRY I. STAFFORD,
DANIEL R. SHOEMAKER,
Flood Building, San Francisco,
Attorneys for Appellee and Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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vs.

MURIEL E. COLTHURST,

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

To the Honorable William B. Gilbert, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellee is entitled to a rehearing in this case. The matter has been erroneously decided; the decision of this Court being entirely based upon a fact not in the record.

The error is found in the following paragraph of the opinion (pages 5-6):

> "The rule, as applied in some of the cases cited, is not without harsh consequences to the injured party. By the carelessness or wilful inaction of the insured who is presumptively antagonistic, one who has a just claim for damages

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APPELLEE'S PETITION FOR A REHEARING.

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Appellee is entitled to a rehearing in this case. The matter has been erroneously decided; the decision of this Court being entirely based upon a fact not in the record.

The error is found in the following paragraph of the opinion (pages 5-6):

> "The rule, as applied in some of the cases cited, is not without harsh consequences to the injured party. By the carelessness or wilful inaction of the insured who is presumptively antagonistic, one who has a just claim for damages

> may be defeated without any fault upon his part. *Whether in such a case the standing of the injured party is no better than that of the delinquent insured we need not here determine. Substantial compliance with the terms of the policy was easily within appellee's power. She knew of the terms of the policy for she sued upon it, and she could have seen to it that appellant was promptly furnished with a copy of the complaint and summons and advised of the date service was made upon Harris. It would have been immaterial that she, rather than Harris, furnished such copies and such information.* (*Slavens v. Standard Accident Ins. Co.*, 27 Fed. (2) 859.) The contract and the statute provide for a suit 'under the terms' of the policy or 'subject to its terms and limitations,' and we think in the most favorable view to the injured party, it was contemplated he would comply with such terms to the extent of his ability. Whether he is subject to conditions over which he has no control we do not determine."

It thus appears that the basis of this decision is the fact that "*substantial compliance with the terms of the policy was easily within appellee's power. She knew of the terms of the policy for she sued upon it, and she could have seen to it that appellant was promptly furnished with a copy of the complaint and summons and advised of the date service was made upon Harris.*"

This cause was tried, submitted and should have been decided upon the stipulated statement of facts. Nowhere in that statement does it appear that appellee "*knew of the terms of the policy*" and it is beyond dispute that she did not "*sue upon it.*"

With due deference, we believe this error is due to the Court's misconception of the action.

The facts are:

This litigation had its commencement with the suit of *Colthurst v. Harris* which was commenced in Napa County on December 21, 1926, to recover for personal injuries alleged to have been received by plaintiff. Judgment was entered in favor of Miss Colthurst, appellee herein, on the 9th day of May, 1927.

The case of *Colthurst v. The Metropolitan Casualty Insurance Company of New York,* the present case, was commenced on March 16, 1928, in the United States District Court for the Northern District of California. This suit was brought to realize on the judgment obtained by Miss Colthurst in the prior action of *Colthurst v. Harris.* Other than that the suits are in no way related or dependent. This later suit, as this Court knows, is based upon a right created and conferred upon the judgment creditor by the statutes of the State of California.

This Court has stated that the appellee knew the insurance company with which the defendant Harris was insured, and that she knew the terms of the policy, and further that she sued upon it—facts which, we submit, cannot be found in, nor inferred from any statement in the stipulated facts or the record. We state to this Court unequivocally and emphatically and to the end that the record may be clear and justice done this appellee that when the suit of *Colthurst v. Harris* was commenced—Decem-

ber 21, 1926,—and for some time beyond the entry of the judgment in that action (May 9, 1927) neither Miss Colthurst nor her counsel knew in what company the defendant was insured.

Further, they did not know the terms of the policy issued by the insurance company until that policy was introduced in evidence in the present action, approximately two and one-half years *after* the commencement of the *Colthurst v. Harris* suit and about one year *after* the entry of judgment in that action.

Let the Court consider these further facts before depriving the appellee of her valid judgment.

1. Without a voluntary disclosure on the part of the insurer or the insured, the party plaintiff has no means of determining or discovering whether or not the defendant is insured and much less the amount or terms of the policy. There is no procedure provided in law or equity by which this fact may be compelled.

2. The insurer is not a proper party to the suit against the insured by the injured person and along this same line, any testimony tending to prove the defendant was insured is improper and, if allowed in the record, reversible error.

3. It is not until the injured person has recovered a judgment that there is any opportunity afforded to discover whether the defendant is insured and even then it is necessary to look to the Statutes of 1919, p. 776 for such authority. It provides:

> "Upon any proceeding supplementary to execution, the judgment debtor may be required to exhibit any policy carried by him, insuring

against the loss or damage for which judgment shall have been obtained." (Stats. 1919, p. 776.)

4. Automobile indemnity policies are not required to be in any definite form. There is no standard policy, they are as varied in their terms as there are various companies that write such policies.

CONCLUSION.

We affirm that it was not until after judgment had been rendered in the *Colthurst-Harris* suit, that the plaintiff became aware of the defendant's insurance company and the suit, which is on appeal before this Court, was commenced.

We respectfully suggest that the opinion rendered in this case is to the practical effect that a person run down and injured on the street, or thrown carelessly from a motor vehicle is forthwith charged with the knowledge of the existence of an indemnity policy, the name and address of the indemnitor, the amount and terms of the policy and although there is no method or means to ascertain any of these facts on the part of the injured person, still such person may not recover. Reason does not lend support to such a doctrine and the Statute of California should not be so emasculated.

The decision of this Court has deprived the appellee of a valid judgment, and it is especially wrong because this Court has based its decision upon a fact not in the record and a fact that cannot be inferred from anything in the record and it has assumed as a

fact knowledge on the part of appellee that she did not have.

Dated, San Francisco,
January 2, 1930.

Respectfully submitted,

HARRY I. STAFFORD,
DANIEL R. SHOEMAKER,
Attorneys for Appellee and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellee and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
January 2, 1930.

HARRY I. STAFFORD,
Of Counsel for Appellee and Petitioner.

No. 5827

United States

Circuit Court of Appeals

For the Ninth Circuit.

JOE FERRIS, FREDDIE MARINO and FRANK FINNEY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 5827

United States

Circuit Court of Appeals

For the Ninth Circuit.

JOE FERRIS, FREDDIE MARINO and FRANK FINNEY,

Appellants,

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Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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county, within said Northern Division, knowingly, wilfully and unlawfully transported a number of cases containing whiskey and gin fit for and intended for use for beverage purposes within the United States of America.

2d Count. (Sec. 37, C. C. U. S.) And the said Grand Jurors, upon their said oaths, do further present that the said defendants JOE FERRIS, JAMES SANCHEZ, FRANK WILSON, FRANK FINNEY and FREDDIE MARINO, on or about the 6th day of March, 1929, in Sonoma County, State of California, and near Monte Rio, a place in said County, within said Northern Division, did feloniously conspire to commit the offense heretofore in this indictment charged, and that thereafter, during the existence of that conspiracy and to effect the objects thereof, one or more of said defendants, as hereinafter specifically named, did the following acts within the Northern Division of the Northern [1*] District of California:

(1) That said defendants transported certain intoxicating liquor, to wit: 147 cases of gin and 14 cases of whiskey.

(2) That JAMES SANCHEZ drove and operated an automobile truck bearing California License No. PC–D93–46.

(3) That JOE FERRIS drove and operated an automobile bearing California License No. 7J 31–17, and known as a Nash Sedan.

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*Page-number appearing at the foot of page of original certified Transcript of Record.

(4) That JOE FERRIS, FRANK FINNEY, FREDDIE MARINO, and each of them, did then and there have in their and his possession a weapon commonly known as a forty-five (45), semi-automatic Thompson machine gun of Colts make.

GEO. J. HATFIELD,
United States Attorney.
ALBERT E. SHEETS,
Assistant United States Attorney.

[Endorsed]: A true bill.

C. H. BREUNER,
Foreman Grand Jury.

Filed Mar. 16, 1929. [2]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the city of Sacramento, on Monday, the 18th day of March, in the year of our Lord one thousand nine hundred and twenty-nine. Present: the Honorable GEORGE M. BOURQUIN, District Judge, for the District of Montana, designated to hold and holding this Court.

[Title of Cause.]

MINUTES OF COURT—MARCH 18, 1929—ARRAIGNMENT.

The defendants being present this day in court in the custody of the U. S. Marshal, waived arraignment upon the indictment filed herein and to said

made a motion for new trial and a motion in arrest of judgment, which motion was ORDERED denied. Defendants James Sanchez and Frank Wilson having previously plead guilty, were present this day in court for the matter of passing judgment. ORDERED that defendants Joe Ferris, Frank Finney, Freddie Marino, James Sanchez and Frank Wilson each be imprisoned for the period of fifteen (15) months at hard labor in the United States Penitentiary at McNeil Island, State of Washington, and that they pay a joint fine in the sum of three thonsand ($3,000.00) dollars; FURTHER ORDERED that in default of the payment of said joint fine that they be further imprisoned until said joint fine be paid or until they be otherwise discharged in due course of law. ORDERED that bond for appeal as to each defendant be fixed in the sum of $5,000.00. ORDERED that the jury be discharged from further consideration of this case, and that they be excused until Tuesday, March 26th, 1929, at 10 o'clock A. M. [5]

[Title of Court and Cause.]

VERDICT.

We, the Jury, find as to the Defendants at the bar as follows:

JOE FERRIS:	Guilty 1st Count.
	Guilty 2d Count.
FRANK FINNEY:	Guilty 1st Count.
	Guilty 2d Count.

FREDDIE MARINO: Guilty 1st Count.
Guilty 2d Count.
J. W. ROBERTS,
Foreman.

[Endorsed]: Filed 3 o'clock and 35 min. P. M., Mar. 25, 1929. [6]

In the Northern Division of the United States District Court for the Northern District of California.

No. 3679.

Convicted Violation of Transporting Intoxicating Liquor and Conspiracy.

THE UNITED STATES OF AMERICA,

vs.

JOE FERRIS, FRANK FINNEY, FREDDIE MARINO, JAMES SANCHEZ and FRANK WILSON.

JUDGMENT.

Albert E. Sheets, Assistant United States Attorney, and the defendants with their counsel came into court. The defendants were duly informed by the Court of the nature of the indictment filed on the 16th day of March, 1929, charging them with the crime of transporting intoxicating liquor and conspiracy; of their arraignment and pleas; of their trial and the verdict of the jury on the 25th day of March, 1929, to wit:

"We, the Jury, find as to the Defendants at the bar as follows:

JOE FERRIS:	Guilty 1st Count.
	Guilty 2d Count.
FRANK FINNEY:	Guilty 1st Count.
	Guilty 2d Count.
FREDDIE MARINO:	Guilty 1st Count.
	Guilty 2d Count.

J. W. ROBERTS,
Foreman."

The defendants were then asked if they had any legal cause to show why judgment should not be entered herein and no sufficient cause being shown or appearing to the Court, and the Court having denied a motion for new trial and a motion in arrest of judgment; thereupon the Court rendered its judgment: THAT, WHEREAS, the said defendants having been duly convicted in this court of the crime of transporting intoxicating liquor and conspiracy;

IT IS THEREFORE ORDERED AND ADJUDGED that the said defendants Joe Ferris, Frank Finney, Freddie Marino, James Sanchez and Frank Wilson each be imprisoned for the period of fifteen (15) months at hard labor in the United States Penitentiary at McNeil Island, State of Washington, [7] and that they pay a joint fine in the sum of three thousand ($3,000.00) dollars; further ordered that in default of the payment of said joint fine that they be further imprisoned

until said joint fine be paid or until they be otherwise discharged in due course of law.

Judgment entered this 25th day of March, 1929.

WALTER B. MALING,
Clerk.
By F. M. Lampert,
Deputy Clerk. [8]

[Title of Court and Cause.]

MOTION OF DEFENDANTS FOR A NEW TRIAL.

Now come the above-named defendants, Joe Ferris, Frank Finney and Freddie Marino, and move the Court to set aside the verdict herein and to grant a new trial, and as reasons therefor show to the Court the following:

I.

The verdict is contrary to the law of the case.

II.

The verdict is not supported by the evidence in the case.

III.

The Court, upon the trial of the case, admitted incompetent evidence offered by the United States.

IV.

That the Court improperly instructed the jury to the substantial prejudice of said defendants.

ants are sentenced to be imprisoned and *and* to pay fines as set forth in the judgments made and entered by the Court in said cause, and to which judgments reference is hereby made for greater particularity, your petitioners say that they, and each of them, are advised by their counsel and therefore that they aver that there was and is manifest error in the record and proceedings had in said cause, and in the making, rendition and entry of said judgments and sentences, and each of them, to the injury and damage of your petitioners, and each of your petitioners, all of which errors may be fully made to appear by an examination of the assignment of errors filed herein and presented herewith and the bill of exceptions filed herein.

And hereby petition this Honorable Court for an appeal herein to the United States Circuit Court of Appeals in and for the Ninth Circuit, and that a full, true and correct transcript of the record and proceedings in said cause be transmitted by the Clerk of this [12] court to the Clerk of the said United States Circuit Court of Appeals; and that during the pendency of this appeal all proceedings had by this court be suspended, stayed and superseded, and that during the pendency of said appeal the said defendants, and each of them, be admitted to bail in such sum or sums as to this Court seems meet and proper.

Dated, Sacramento, California, March 27, 1929.

JAMES B. O'CONNOR,
HAROLD C. FAULKNER,
Attorneys for Defendants.

Due service of the within petition and receipt of a copy thereof is hereby admitted this 27th day of March, 1929.

ALBERT E. SHEETS,
Attorney for the United States.

[Endorsed]: Filed Mar. 27, 1929. [13]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL, SUPERSEDEAS AND FIXING BOND.

Upon motion of the attorneys of the above-named defendants, Joe Ferris and Freddie Marino and Frank Finney, and it satisfactorily appearing that said defendants have this day filed their, and each of their, notices of appeal to the United States Circuit Court of Appeals in and for the Ninth Circuit, from the judgments, and each of said judgments, made and entered in the above-entitled cause against them, and each of them, on March 25, 1929, and said defendants, and each of them, have filed their petition for an appeal, together with their assignment of errors, and will file, within the time required by law, their proposed bill of exceptions,—

upon which they, and each of them, will appeal for the reversal of said judgments, and which said errors, and each of them, are to the great detriment, injury and prejudice of said defendants, and each of them, and in violation of the rights conferred upon them, and each of them, by law; and each of said defendants says that in the record and proceedings in the above-entitled cause, upon the hearing and determination thereof in the Northern Division of the United States District Court for the Northern District of California, there is manifest error in this, to wit: [16]

I.

The Court erred in admitting in evidence certain testimony over the objection of defendants as will more fully appear as follows:

The witness was permitted to describe the actions of two co-defendants at the time of their arrest out of the presence of the defendants on trial over the objection of the defendants on trial, particularly in this:

Mr. SHEETS.—Q. What was their action at that time?

A. Very nervous.

Mr. FAULKNER.—Same objection. The act is the same as the declaration. You cannot bind the co-conspirator,—

Mr. SHEETS.—No, your Honor, that is not correct, there is considerable doubt as to whether or not the conspiracy had terminated yet.

The COURT.—Objection will be overruled.

Mr. FAULKNER.—Exception.

The objection quoted above was supplemented by reference to the prior objection as follows:

Mr. FAULKNER.—Before any reply is given to that we wish to object to any statement made by Sanchez or Wilson out of the presence of the parties here on the ground it is hearsay and the proper foundation has not been laid and any conspiracy, if any existed, has terminated.

To which ruling the defendants then and there duly and regularly excepted.

II.

The Court erred in overruling the motion of the defendants to strike out the testimony of the witness as more fully appears as follows:

The WITNESS.—After being handcuffed together, they had got pretty well forward, they kept edging back toward the rear of the [17] truck, there was about fifteen steps between the car and the place where they had been, they kept watching down the road, the way they had come.

Mr. FAULKNER.—We ask that be stricken out as being an opinion and conclusion of the witness, and not definitely fixing the defendant.

The COURT.—The motion will be denied.

Mr. FAULKNER.—Exception.

To which ruling the defendants then and there duly and regularly excepted.

III.

The Court erred in admitting in evidence cer-

tain testimony over the objection of the defendants in connection with the presence of revenue stamps on the liquor on the truck as follows:

Q. Did they have any United States Government strip stamps on them? A. No.

Mr. FAULKNER.—We object to that as incompetent, irrelevant and immaterial, and not the best evidence.

The COURT.—Overruled.

Mr. FAULKNER.—Exception.

To which ruling the defendants then and there duly and regularly excepted.

IV.

The Court erred in admitting in evidence Exhibit No. 1, coil of rope, as more fully appears as follows:

Mr. SHEETS.—I ask the coil of rope be marked Government's Exhibit No. 1.

Mr. FAULKNER.—We object to that as incompetent, irrelevant and immaterial, and not as tending to prove any of the issues in this case.

The COURT.—The Government cannot prove its case all at once. It will be admitted. Overruled. [18]

Mr. FAULKNER.—Exception.

(Rope marked Government's Exhibit No. 1.)

To which ruling the defendants then and there duly and regularly excepted.

V.

The Court erred in admitting in evidence certain exhibits over the objection of the defendants as will more fully appear as follows:

Mr. SHEETS.—I ask the gun, ramrod and the case be marked Government's Exhibit 2 and I offer it in evidence.

Mr. FAULKNER.—We object as incompetent, irrelevant and immaterial, and no proper foundation laid.

The COURT.—Overruled.

Mr. FAULKNER.—Exception.

(Documents marked Government's Exhibit 2.)

To which ruling the defendants then and there duly and regularly excepted.

VI.

The Court erred in admitting in evidence certain testimony over the objection of the defendants as will more fully appear as follows:

Q. Now at that point where you stopped the automobile and the truck how far is it from the coast of Sonoma County, the Pacific Coast?

Mr. FAULKNER.—We object as incompetent, irrelevant and immaterial, and not tending to prove any of the issues in this case.

Mr. SHEETS.—The object is to show that liquor could have been landed at that place.

Mr. FAULKNER.—The only charge is transportation—

The COURT.—It may be a circumstance that would serve—Oh, objection will be overruled.

Mr. FAULKNER.—Exception. [19]

The WITNESS. A. 40 miles.

Q. Within a radius of 40 miles how many places are there along there that the boats could land?

Mr. FAULKNER.—I object to that as incompetent, irrelevant and immaterial, and calls for an opinion and conclusion of the witness, and requires expert testimony.

The COURT.—Objection overruled.

A. How many places?

Mr. SHEETS.—Q. Would you say ten places?

A. Ten or more.

To which ruling the defendants then and there duly and regularly excepted.

VII.

The Court erred in admitting evidence as to the conduct of the co-defendants at the time of their arrest as appears more fully as follows:

Q. What was the conduct of the two defendants when they got out of the car, what did they do?

Mr. FAULKNER.—We make the same objection, the conduct cannot bind the co-defendants charged by their actions.

The COURT.—Overruled.

Mr. FAULKNER.—Exception.

The WITNESS.—They got out of the car and stepped out in the road, I told them to get out, and Deputy Sheriff Shulte put the handcuffs on them and they seemed to try to get away from him, stepped around—

Mr. SHEETS.—Q. What did they do?

A. They stepped around in behind the truck. The car was stopped about 15 or 20 feet back of the truck and they stepped in back of the truck

or the side of the road so he ordered them back duly and regularly excepted. [20]

To which ruling the defendants then and there into the road where we were.

VIII.

The Court erred in admitting in evidence certain testimony over the objection of the defendants with reference to the territory near the place of seizure being adaptable for landing liquor, more fully appears as follows:

Q. Within a radious of forty miles there how many places could a boat land on the coast?

Mr. FAULKNER.—We make the same objection, calling for expert testimony and not within the issues.

The COURT.—Overruled.

Mr. FAULKNER.—Exception.

To which ruling the defendants then and there duly and regularly excepted.

IX.

The Court erred in admitting in evidence certain testimony over the objection of defendants as will more fully appear as follows:

Q. Are you acquainted with the coast along the Sonoma County coast line? A. Yes.

Q. About how many places are there along that coast line where small boats could land?

Mr. FAULKNER.—We object to that as incompetent, irrelevant and immaterial, and not within the issues of this case, and an attempt to make a showing in connection with a violation of

the Tariff law under an indictment charging the prohibition law.

The COURT.—The purpose is to show this liquor might have come in in one of those places and that is one of the circumstances in connection with the plaintiff's case. He may answer it. Overruled.

Mr. FAULKNER.—Exception.

The WITNESS.—Fisherman's Cove, Timber Cove, Stillwater Cove—

Mr. SHEETS.—Q. About how many, I asked you? [21]

A. I would say about ten places marked on the chart and perhaps ten more that have no name.

To which ruling the defendants then and there duly and regularly excepted.

X.

The Court erred in admitting in evidence certain testimony over the objection of the defendants, as more fully appears as follows:

Q. Do you observe this rope here, Government's Exhibit 1? A. Yes.

Q. What is a rope similar to that used for by seafaring men?

Mr. FAULKNER.—We object to that as incompetent, irrelevant and immaterial, and the proper foundation has not been laid, and not within the issues in this case.

The COURT.—Well, I think he may answer it. Overruled.

Mr. FAULKNER.—Exception.

The COURT.—What have you seen such ropes used for along the coast?

A. On my vessel and on a vessel of that size they are used for mooring lines or a tow line.

To which ruling the defendants then and there duly and regularly excepted.

XI.

The Court erred in admitting in evidence Government's Exhibit No. 3 over the objection of the defendants, as more fully appears as follows:

Mr. SHEETS.—I ask that bottle 57146 be offered in evidence as Government's Exhibit 3.

(Bottle received and marked Government's Exhibit 3.)

Mr. FAULKNER.—We object, the proper foundation has not been laid. [22]

The COURT.—Objection overruled.

Mr. FAULKNER.—Exception.

To which ruling the defendants then and there duly and regularly excepted.

XII.

The Court erred in admitting in evidence Government's Exhibit No. 4 over the objection of the defendants, as more fully appears as follows:

Mr. SHEETS.—I offer in evidence Government's Exhibit 57147 as Government's Exhibit No. 4.

Mr. FAULKNER.—Same objection.

The COURT.—Overruled.

Mr. FAULKNER.—Exception.

(Bottle received and marked as Government's Exhibit 4.)

To which ruling the defendants then and there duly and regularly excepted.

XIII.

The Court erred in overruling the motion for a directed verdict and opposed by the defendants at the conclusion of the Government's case, which said motion more fully appears as follows:

Mr. FAULKNER.—If the Court please, at this time on behalf of the defendants jointly and severally we move the Court for a directed verdict as to each count of the indictment upon the ground the evidence is insufficient to justify or sustain a verdict as to all or either of the defendants, as to each count in the indictment.

The COURT.—The motion will be denied.

Mr. FAULKNER.—Exception.

To which ruling the defendants then and there duly and regularly excepted.

XIV.

The Court erred in failing to instruct the jury to disregard [23] the statements of the District Attorney in regard to the lack of contradiction in the evidence, as more fully appears as follows:

Mr. FAULKNER.—We ask the Court at this time to instruct the jury to disregard the statement of the district attorney in regard to the lack of contradiction in the evidence as misconduct on his part.

The COURT.—In regard to what?

Mr. FAULKNER.—On the plea of not guilty, that contradicted the charge here and the District Attorney said the evidence produced by the Government was uncontradicted which is, I think, mis-

conduct and I will ask the Court at this time to instruct the jury to di. egard it.

The COURT.—That very question arose in a case that was tried before me sitting in Montana and it came down to the Circuit Court of Appeals and my instruction that it was not misconduct was upheld. The Court will qualify it, in this case, since you have mentioned it, however, by saying uncontradicted saving that presumption of innocence, and you will have it further in the instructions. You can have your exception now. The motion is denied.

Mr. FAULKNER.—Exception.

To which ruling the defendants then and there duly and regularly excepted.

XV.

That the Court erred in failing to give the following instruction tendered by defendants, to which ruling defendants then and there excepted as fully appears in the Bill of Exceptions:

> "In determining the guilt or innocence of these defendants upon the charge of conspiracy alleged in the indictment, I charge you that the burden was upon the government in this case to prove to a moral certainty and beyond a reasonable doubt that the contents of the automobile truck referred to in the evidence in this case was at said time being illegally transported." [24]

XVI.

That the Court erred in instruction the jury with

reference to proof of illegality of possession of liquor transported as follows:

"There is such a thing as lawful transportation of liquor but it is never legal unless those transporting it have a permit from the commissioner of the internal revenue department to do so. There is no evidence in this case that the defendant has a permit but you can, if you see fit, ascertain from the circumstances whether or not this was a lawful transportation. You may look at the character of the locality where it was being transported. There can be no legal transportation of liquor for beverage purposes at any time. A permit is never issued to transport liquor for beverage purposes. You may look at the nature of the liquor. On its face it appears to be foreign liquor, whisky. The whisky is branded "Scotch production," I think, and the gin is branded as Holland production, Dutch production. There is a presumption whenever liquor is found in the possession of anyone that the possession is for unlawful purposes, namely for sale or otherwise unlawfully furnishing it to anyone so in so far as this liquor was found in the possession of those defendants who have plead guilty the presumption is that they had possession unlawfully and so they were likewise transporting it unlawfully.

If from all the circumstances in the case you arrive at a conclusion the liquor was being unlawfully transported then it is for you to say

whether these defendants had any part in that act.

To the giving of which instructions these defendants then and there excepted.

XVII.

That the Court erred in denying defendants' motion for a new trial to which ruling defendants excepted and which motion is fully set out in Bill of Exceptions herein.

WHEREFORE, for the many manifest errors committed by the Court, the defendants through their attorneys pray that said sentences and the judgments of conviction be reversed; and for such other and further relief as to the Court may seem meet and proper.

JAMES B. O'CONNOR,
HAROLD C. FAULKNER,
Attorneys for Defendants.

Service and receipts of copy admitted this 27th day of March, 1929. [25]

GEO. J. HATFIELD,
U. S. Attorney.
ALBERT E. SHEETS,
Asst. U. S. Atty.

[Endorsed]: Filed Mar. 27, 1929. [26]

[Title of Court and Cause.]

BILL OF EXCEPTIONS, ON BEHALF OF THE DEFENDANTS JOE FERRIS AND FREDDIE MARINO.

BE IT REMEMBERED, that heretofore, to wit, on March 16, 1929, the Grand Jury of the United States, in and for the Northern District of California, Northern Division, did present and return into and before the above-entitled court its indictment against the above-named defendants; that on said day said indictment was filed in said court and thereafter each of said defendants was duly arraigned, as shown by the record on file in the above-entitled cause.

AND BE IT FURTHER REMEMBERED, that said defendants Joe Ferris and Freddie Marino, and Frank Finney, pleaded not guilty to said indictment on March 18, 1929, and the cause being at issue, the same came on regularly for trial before Honorable George M. Bourquin, United States District Judge, on March 25, 1929, and a jury was duly empaneled and sworn to try the cause, the United States being represented by George E. Hatfield, Esq., United States Attorney, and Albert E. Sheets, Esq., Assistant United States Attorney, and the defendants above named being personally present and represented by their counsel, James B. O'Connor, Esq., Harold C. Faulkner, Esq., and T. A. Farrell, Esq.

(Testimony of William A. Shulte.)

After said jury was duly empaneled and sworn as aforesaid, the Assistant United States Attorney, A. E. Sheets, Esq., made a spoken statement to the jury as to the matter the plaintiff expected to [27] prove.

Thereafter the following proceedings were had:

TESTIMONY OF WILLIAM A. SHULTE, FOR THE GOVERNMENT.

WILLIAM A. SHULTE, produced as a witness on behalf of the United States, being first duly sworn, testified in substance as follows:

Direct Examination by Mr. SHEETS.

I am a deputy sheriff of Sonoma County and on the 6th day of March, 1929, at 8:30 o'clock in the morning had occasion to stop a truck containing whiskey and gin on a road out from Monte Rio a short way.

A. We were stopped at the Russian River Bridge at Monte Rio around 8:30 in the morning and a G. M. C. truck, about two and a half tons, came across the bridge into Monte Rio and right at the end of the bridge the road was very rough and it crossed the road, and we could hear bottles rattling in the closed part. It was covered with canvas. The sheriff says to me, "That must be it, Bill." I says, "Yes, let's get it." The truck was moving at a pretty good rate of speed and we overtook it. I should say, we run to pick them up about 45 or 46 miles an hour and when we picked—

(Testimony of William A. Shulte.)

The COURT.—Well, get to it quickly and give the speed.

A. We stopped the truck about a mile and a half out of Monte Rio. We came up alongside it and as we pulled up alongside the sheriff blew his siren and then dropped back of the truck and stopped and we stood alongside the truck and ordered the two men out, one getting out on each side. The sheriff asked them what they had in the truck—

Mr. FAULKNER.—Before any reply is given to that we wish to object to any statements made by Sanchez or Wilson out of the presence of the parties here on the ground it is hearsay and the proper foundation has not been laid and any conspiracy, if any existed, has [28] terminated.

The COURT.—Yes, nothing in relation to these other defendants, if they said anything, you don't assume they did, as a matter of fact you don't assume they said anything about the other defendants?

Mr. SHEETS.—No, your Honor.

The COURT.—Come briefly to it. There is no dispute there on the fact the truck was there. Proceed.

The WITNESS.—We handcuffed them together and in a matter of two minutes—

Mr. SHEETS.—Q. What was their action at that time?

A. Very nervous.

Mr. FAULKNER.—Same objection. The act is

(Testimony of William A. Shulte.)

the same as the declaration. You cannot bind the co-conspirator,—

Mr. SHEETS.—No, your Honor, that is not correct, there is considerable doubt as to whether or not the conspiracy had terminated yet.

The COURT.—Objection will be overruled.

Mr. FAULKNER.—Exception.

The WITNESS.—(Continuing.) After being handcuffed together, they had got pretty well forward, they kept edging back toward the rear of the truck, there was about fifteen steps between the car and the place where they had been, they kept watching down th road, they way they had come.

Mr. FAULKNER.—We ask that be stricken out as being an opinion and conclusion of the witness, and not definitely fixing the defendant.

The COURT.—The motion will be denied.

Mr. FAULKNER.—Exception.

The WITNESS.—(Continuing.) They edged around the back of the truck. I ordered them back a couple of times and about the time they got back I looked down the road. They got back clear to the [29] right-hand corner of the truck, then I ordered them back again, that is right to the left rear corner of the truck, by the road alongside of the truck. Then I got behind them and I looked down the road myself and I seen this car coming and the men looked very tired and rough looking and I said, "For Christ's sake, Doug, here comes the rest of the gang." At that moment I was standing right behind the prisoners who were be-

(Testimony of William A. Shulte.)

tween me and the coming automobile. The sheriff was standing along the road by the side of the truck, the left side of the truck to my right. The prisoners would be in line between him and the automobile. We were pretty well lined up the road. As the car came up I pulled my gun and the sheriff walked out and waived the car down. The car stopped in the middle of the road at the command of the sheriff. I kept the car covered all the time as it passed me with my gun and the sheriff ordered Williams, the driver of the car, out of the car, and he got out on the left-hand side and I was standing just with the two men then in the middle of the road and as he got out the left-hand side I hollered to him, I said, "You better get the other man out," and he walked around the front of the truck with Williams and got the other man by the name of Mays out of the truck. Mays is Marino. Mays is the name he gave us there and later he gave the name of Freddie Marino. The driver gave the name of Williams to our office and later gave the name of Joe Ferris. They are the two defendants, Marino and Ferris, here charged, the two on my left looking down. After he walked around the right-hand side and opened the door Mays got out and he searched Mays and asked him if he had a gun and he said, "No." Williams said, "I have a gun sheriff, and I will get it for you." The sheriff says, "No, keep your hands out of your pocket, I will get it." And he took the gun, put his hand in his pocket and took out a gun, a 38 Colts.

(Testimony of William A. Shulte.)

Yes, *polic* positive, loaded. The sheriff took the gun out of his pocket and handcuffed them two men together and [30] says to me.—I then walked around the car to the left-side and he says: "Bill, get that rifle." I reached in and pulled it out, muzzle to me and the gun was laying that way, and pulled it out, and I seen it was a Thompson machine gun and said to Doug, "Christ sakes, Doug, it is a machine gun."

The COURT.—Don't be too literal, Witness.

The WITNESS.—We looked around and he says, "What have you got that thing with you for?" Williams said, "Well, we haven't got that for you, Sheriff, we have got that for high-jackers." Mays spoke up a little later and says, "We have been hunting," and stated that he had taken the machine gun to hunt quail. He said it seriously, no smiles. The sheriff looked in the rear seat and seen Finney, the man sitting on my right at the table, laying in the back of the front seat, and was asleep or pretended to be, and he ordered him out and he started to get out the right side and he said, "Get out this side." He got out and as he got out he says, "Well, I am not going to stay here, you have got nothing on me, I am going to get out of here," and started down a little road that was opposite the car, on the right-hand side of the car. I ordered him back. He had gone about 25 or 30 feet, and he came back and stood there a few minutes and then says, "I am going home," and started down the road and right there we give him plain language to stop or he

(Testimony of William A. Shulte.)

would be brought back right. He tried to get away twice. We found 151 cases of gin and 19 sacks of Scotch whiskey in the truck.

Q. Did they have any United States Government strip stamps on them? A. No.

Mr. FAULKNER.—We object to that as incompetent, irrelevant and immaterial, and not the best evidence.

The COURT.—Overruled.

Mr. FAULKNER.—Exception.

WITNESS.—It was similar to this whiskey bottle and gin bottle. [31] There were some other different kinds of Scotch whiskey and gin in there. I delivered some of it to a federal prohibition agent, Mr. Goodman. I found a big coil of rope in the automobile. The rope you show me is the same coil of rope.

Mr. FAULKNER.—We object to that as incompetent, irrelevant and immaterial, and not tending to prove any of the issues in this case.

The COURT.—The Government cannot prove its case all at once. It will be admitted. Overruled.

Mr. FAULKNER.—Exception.

(Rope marked Government's Exhibit No. 1.)

WITNESS.—The truck was painted green. There is green on this rope, on one end of it, exactly the same as the paint on the truck

That case you show me was in the rear of the automobile. This (displaying a gun), was in that case.

(Testimony of William A. Shulte.)

The COURT.—Just a moment. Do we understand that gun was in the case when he took it out of the automobile?

The WITNESS.—The gun was in the front seat laying right on the floor-board.

The COURT.—That is the gun you pulled out muzzle to you?

A. Yes.

The COURT.—You are fortunate to be here.

The WITNESS.—The ram rod was in the case. There was 20 shells in the clip. The clip that was in the gun at the time shot 20 shots.

Mr. SHEETS.—I ask the gun, ram rod and the case be marked Government's Exhibit 2 and I offer it in evidence.

Mr. FAULKNER.—We object as incompetent, irrelevant and immaterial, and no proper foundation laid.

The COURT.—Overruled.

Mr. FAULKNER.—Exception.

(Documents marked Government's Exhibit 2.) [32]

The WITNESS.—This pistol you show me is a Colts 38 positive taken from Williams by Sheriff Bills. Mays was in the car with the gun right at his feet. The gun was in the same condition as it is now. The gun fires with or without the shot. At that time the stock was on it.

Q. Now at that point where you stopped the automobile and the truck how far is it from the coast of Sonoma County, the Pacific Coast?

(Testimony of William A. Shulte.)

Mr. FAULKNER.—We object as incompetent, irrelevant and immaterial, and not tending to prove any of the issues in this case.

Mr. SHEETS.—The object is to show that liquor could have been landed at that place.

Mr. FAULKNER.—The only charge is transportation—

The COURT.—It may be a circumstance that would serve—Oh, objection will be overruled.

Mr. FAULKNER.—Exception.

The WITNESS.—A. 40 miles.

Q. Within a radius of 40 miles how many places are there along there that the boats could land?

Mr. FAULKNER.—I object to that as incompetent, irrelevant and immaterial, and calls for an opinion and conclusion of the witness, and requires expert testimony.

The COURT.—Objection overruled.

A. How many places?

Mr. SHEETS.—Q. Would you say ten places?

A. Ten or more. There was some sand in the rear part of the automobile.

Cross-examination by Mr. FAULKNER.

Other than the rope, gun and sand there was in the automobile, a roll of blankets, a bed for one man, and also some steaks and some provisions. I should say two or three meals. There was some canned goods. I never counted them, four or five. There were no boxes [33] that I saw.

The time between the presence of the two de-

(Testimony of William A. Shulte.)

fendants on trial and the overtaking of the truck, was two or three minutes, no more. The truck was a mile or a mile and a half from Monte Rio. With reference to the entrance to Bohemian Grove it was north of a place called Tyrone. In connection with it being south of the entrance to Bohemian Grove, you don't go near the entrance to Bohemian Grove, going toward Duncan's Mills. The road does not follow the river. After leaving Monte Rio it goes in a southeasterly direction on the easterly side of the river.

After we saw the truck in Monte Rio it took us four or five minutes to overtake the truck. When we overtook the truck we were going around 46 miles an hour and having in mind the speed of our car, I would approximate the speed of the truck when we first observed it as going very slow. When we overtook the truck I would say the truck was traveling 38 miles an hour.

The sheriff drove his car up alongside where he could see the two men at the cab of the truck, blew the siren and dropped back to the rear when the truck came to a standstill. We were about 15 feet to the rear. I first got out to the right-hand side as he was driving and he got out right afterwards. I then walked up to the truck and had some conversation with the men in it. They then stepped down. They were ordered down, one from each side. The men were then handcuffed together. Before handcuffiing them we searched them. In the meantime the sheriff's car was standing right

(Testimony of William A. Shulte.)

where it always stood. During the entire period of time I have testified to the sheriff's car was always at the back of the truck. It is not a fact that after the men had been handcuffed the sheriff got in his own car in front of the truck. It remained in the same position until we left to go to Santa Rosa.

No other machine or truck passed while we were there before the [34] defendants came. A sedan automobile did not pass. No cars or trucks or any kind passed between the time the Nash came up and the time we stopped the other truck. No automobile went either way.

I searched the driving cab of the truck. That was after the defendants on trial made an appearance, when I got in to drive the truck to Santa Rosa. I drove it to Santa Rosa. I did not make any notations of the time at the time that the arrests were made, nor no notations in connection with the arrest of the defendants. At the time Williams made the statement in connection with the gun, by Williams is meant Ferris, the persons present were Ferris, Marino, the sheriff and myself and the two boys on the truck and Finney was supposed to be asleep on the back seat of the sedan. The statement was made to the sheriff in my presence in response to a question. The sheriff asked him what he had this gun for. He asked that question of Williams. As to whether Mays had the gun, it was in the front seat on the floor.

Q. When the sheriff arrested Williams or Ferris

(Testimony of William A. Shulte.)

he stepped up and the sheriff asked him if he had a gun?

A. At that time, that was the beginning of the search.

Q. Then you searched Mays, isn't that correct?

A. Yes.

Q. When was the gun first seen by either you or the sheriff?

The COURT.—Which gun, you have two guns here.

Mr. FAULKNER.—That is the rifle.

The WITNESS.— ——

Mr. FAULKNER.—Yes.

The WITNESS.—The first time I seen the gun was when the sheriff told me to take that rifle out from under the front seat, in front of the front seat. That was after the defendants here on trial were handcuffed. I was on the right-hand side at the rear of the automobile, on the right-hand side when Marino got out of the car. I did not notice the rifle at that time. I was back too far. I [35] handcuffed Marino and Ferris and the discussion in regard to the rifle was right after that. We had not started to Santa Rosa at that time.

Q. How long did it take you to get under way, the truck and all five of the men you have arrested?

A. Well, to get under way, we had that sedan there and Williams says, "Sheriff, I will drive you in in my car."

I believe Williams was handcuffed at that time. That was after the discussion in regard to the ma-

(Testimony of William A. Shulte.)

chine gun. The sheriff says: "Oh, no you won't, you will go in my car."

It is not a fact that the arrangement in regard to Mr. Ferris driving the car back to Santa Rosa occurred before the machine gun was seen and that is the reason the sheriff did not permit him to drive the car back. The sheriff would not have permitted him to drive the car back whether it was or not. I don't remember the exact time when that was said but he would never have permitted that.

It is not a fact that at the time of the arrest of Mr. Ferris and Mr. Marino, Mr. Ferris was to drive the sheriff back in his car and then the rifle was discovered.

Mr. FAULKNER.—Q. Isn't it a fact, Mr. Shulte, that Mr. Ferris, the man you call Williams, said that that rifle was not for the officers?

A. It is a fact. He says, "That is not for you, Sheriff, that is for high-jackers."

I am sure he said that and I am sure of the time he said it. I believe he was handcuffed. I would say yes.

The other defendants at the time this was going on were brought up with me to the sedan, they came to the sedan with me as I came up. They were handcuffed at that time. The defendant I mentioned trying to run away was Finney. He never was handcuffed.

Q. You did not take very seriously his effort to get away? [36]

(Testimony of William A. Shulte.)

A. We just happened to run out of handcuffs, that was the point.

Q. Now, then, was there any question at any time by Mr. Ferris or Mr. Marino concerning their acquaintanceship with the man on the truck?

A. At that time?

Q. Yes. A. No, I don't believe there was.

Q. Did that occur to you to ask them if they knew the men on the truck?

A. We felt pretty sure they did know them.

Mr. FAULKNER.—I ask that be stricken out.

The COURT.—Yes, read the question.

(Question read.)

A. Why no, it never occurred to us.

There were no questions asked by the sheriff in my presence of any of the three defendants on trial in connection with whether they knew any of the men on the truck. The question was asked in my presence at the sheriff's office, in the private office of the sheriff, of Mr. Finney. The district attorney of *the* Sonoma County, the sheriff and myself were present.

Q. At any time did you advise the defendants—When was the first time you advised the defendant Marino, Ferris, or Finney, that they were under arrest? A. When were they advised?

Q. Yes.

A. There was no warrant sworn to at that time, no.

Q. Did you ever advise them that they were under arrest?

(Testimony of William A. Shulte.)

A. Yes, they seen the warrant at the time the warrant was sworn to and they were taken over and arraigned, and they were then advised.

Q. At any time after you took the physical custody of these defendants at the place that you stopped that truck did you ever advise [37] any of them that any statement they would make might be used against them? A. No.

I did not ever advise any of the three *dividends* that they were being arraigned in connection with the violation of any law in connection with intoxieating liquor. I have not the least idea where the truck is that is painted similar to the rope. It is not in the custody of the sheriff of Sonoma County.

Redirect Examination by Mr. SHEETS.

I turned it over to the prohibition department. Four of the men had on black jeans, black overalls. The fifth one was Wilson. He had on a pair of, I think Khaki pants or whipcord pants and high shoes. We found an extra pair of black jeans where he had been riding, similar to the ones the other men were wearing. The condition of the extra pair of pants was wet and sandy.

Recross-examination by Mr. FAULKNER.

We examined the clothing of the three defendants on trial while searching them at the county jail at Santa Rosa. I did not say there was any evidence of dampness on their clothing. In connection with the provisions in that car, and whether

(Testimony of William A. Shulte.)

there were three boxes of provisions and a mattress. I know there was a mattress in the car. I would not say three boxes of provisions. I am kind of faint on how much provisions were in the car, I would not say. There was not a great deal. (R., pp. 5–20.)

TESTIMONY OF E. D. BILLS, FOR THE GOVERNMENT.

E. D. BILLS, produced as a witness on behalf of the United States, being first duly sworn, testified in substance as follows:

Direct Examination by Mr. SHEETS.

I am a sheriff of Sonoma County and about 8:30 on the morning of March 6th I had occasion to seize a truck containing 151 cases of gin and Scotch whiskey near Monte Rio. I should say a mile and a half or two miles out of Monte [38] Rio. Deputy Sheriff Shulte and myself were in Monte Rio on the morning of March 6th. We were sitting in a machine talking to a man there.

The COURT.—Now, get to the truck, we don't care what conversation you had with anybody in Monte Rio.

WITNESS.—We saw the truck pass by and cross over a little bridge near us and heard bottles rattling in it and figured it out and about a mile or mile and a half, something of that sort, we overtook it and pulled up alongside of it and I gave them

(Testimony of E. D. Bills.)

the siren and slowed down, they slowed down and I pulled in behind them to the side of the road and stopped and got out of the truck, or out of the machine and went up to the truck. The deputy sheriff and myself both went up to the truck and I said to them, "What have you fellows got here."

We ordered them out of the truck and they got out in the road. There was liquor in the truck covered by a canvas. About 151 cases I think of whiskey and several cases of gin, similar to these two bottles you have in your hand. I turned them over to the prohibition agent named Goodman.

Q. What was the conduct of the two defendants when they got out of the car, what did they do?

Mr. FAULKNER.—We make the same objection, the conduct cannot bind the co-defendants charged by their actions.

The COURT.—Overruled.

Mr. FAULKNER.—Exception.

The WITNESS.—They got out of the car and stepped out in the road, I told them to get out, and deputy sheriff Shulte put the handcuffs on them and they seemed to try to get away from him, stepped aroun*t*—

Mr. SHEETS.—Q. What did they do?

A. They stepped around in behind the truck. The car was [39] stopped about 15 or 20 feet back of the truck and they stepped in back of the truck or the side of the road so he ordered them back into the road where we were.

(Testimony of E. D. Bills.)

Then I was looking at the truck and went to the front end of the truck to see if I could find an identification certificate in it. I looked up the road. The time that elapsed between the time I stopped them and the time I looked up the road along the way they had come was perhaps two minutes, a couple of minutes. I saw a closed car coming. A sedan automobile. It looked to be a Nash, I think they call it a Nash 400. It is a big Nash. Shulte and the two men were near the rear end of the truck. I was near the front end. They were all in the road. The two prisoners were ahead of me and Shulte at the time the car was sighted so they were between me and the car. As the car pulled up to us Shulte pulled his gun and I think he motioned to them to stop, I am not sure. He covered them with his gun.

I motioned to the car to stop myself, stepped out in the road and they slowed down and I ordered them over to the side of the road ahead of the truck and we all went up to the front end of the car and the driver of the Nash car opened the door and looked out and he ordered them out of the car, told them to get out into the road. We got him out and went around the front end of the car and got the other man out.

The driver gave his name as Frank Williams. His name is Joe Ferris. I see him at the table here. The other man gave his name as Jack Mays. His name is Fredie Marino. With respect to what I did to Mays when he got

(Testimony of E. D. Bills.)

All these men had on dark colored clothes. I think their pants were sort of black jeans, I think they call them. All were the same kind but one. There was one man who had, a man named Wilson on the truck, had on a pair of high-topped lace shoes and I think khaki pants. There was a pair of black jeans found in the truck where Wilson was riding.

I saw this rope, Government Exhibit 1, in the car between the front and back seat. The truck was painted I think a dark blue. I think it was a dark color at least. I mean the truck was green. I thought you meant the sedan.

Q. How far is the point where you arrested these men from the coast?

A. An air line would probably be six or eight miles.

Q. Within a radius of forty miles there how many places could a boat land on the coast?

Mr. FAULKNER.—We make the same objection, calling for expert testimony and not within the issues.

The COURT.—Overruled.

Mr. FAULKNER.—Exception.

The WITNESS.—There are several, I don't know how many there would be, but a number of places, I think. I know of one other place where I have seen liquor that has been landed. [42]

This automobile was coming from that general direction. I put these three defendants in my automobile and started to town. Well, Ferris repeated

(Testimony of E. D. Bills.)

again they did not have the gun for officers, that they had it for hi-jackers, and he wanted to call up somebody in San Francisco. He wanted to know if I would let him call up somebody. I said, "This is no time now to talk about it, you cannot call up anybody now, wait until you get in to Santa Rosa. You can do it then." He also made a remark about knowing some people in Sonoma County they thought were friends of mine and wanted to know if there was not some way of fixing it up. He also said, "I thought the officers in this county were all right to come through here." I said, "Where did you get any idea of that kind?" I said, "You come through here in broad daylight and right under a man's nose and do you expect him to stand for that?" The machine gun was loaded.

Mr. SHEETS.—That is all.

Cross-examination by Mr. FAULKNER.

I think the conversation was between Mr. Ferris and myself.

Q. Are you sure of that?

A. Yes, there was conversation between me and Mr. Ferris.

The conversation I just related in connection with fixing this up and referring to mutual friends of himself and myself was, I think, with Mr. Ferris. The reason I say think was because he seemed to be doing most of the talking. Conversation was had by me with Mr. Ferris. He was sitting in the back

(Testimony of E. D. Bills.)

seat. Finney was sitting in the front seat. I did not fix it up with him.

In this conversation between myself and the defendants on the way in I intended at that time to charge them with the illegal possession of fire arms. That is the only offense I ever charged them with. I think the three of them were charged with the possession of a machine gun. Ferris was also charged with having in his possession a concealed weapon. That is the only charge I have ever placed against these three defendants in Sonoma County. The number [43] of times reference was made to hi-jackers by the defendants was probably twice. The occasion of referring to it the second time was in the course of conversation as I have already stated. As to whether I asked the questions, I don't remember exactly. I think perhaps it is a fact that the first question I asked defendant Ferris was "Have you anything to do with these men on the truck?" When I first apprehended him his answer if I asked him that question was that he did not know them. During the entire time he was in my custody I probably asked him the same question on several different occasions and of course he denied he knew them. I did not believe him.

Q. Why didn't you charge him with the transportation of liquor in Sonoma County?

WITNESS.—We simply placed a charge against the men who had the liquor in their possession at that time.

(Testimony of E. D. Bills.)

We placed the charge against the men who had the liquor in their possession at the time and placed the charge in connection with fire arms against these defendants on trial.

I testified that during the ride in, Mr. Ferris asked if he could use a telephone.

Q. And you told him he could use a telephone in Santa Rosa. When was the first time you permitted Mr. Ferris to use a telephone in connection with the date of this arrest?

A. I cannot answer that question because I don't know. He was placed in the jail and I don't know what time the jailer allowed him to telephone.

It is a fact that he was placed in jail on the morning of March 6.

Q. And on the afternoon of that day he was brought to your office and demanded the advice of counsel which was refused by you?

A. We started to ask him a few questions in *with* the district attorney and myself and he said he did not want to talk about it [44] unless he had his attorney.

Q. That was refused? A. No.

Q. Was it permitted? Did you permit him to use the telephone to get an attorney?

A. Not at that time because we were so busy we could not be bothered with it.

I think the following day he was brought before the Justice of the Peace on the gun charge. I was present at that time. I can't say whether it was a fact, I think probably it was a fact, that a request

(Testimony of E. D. Bills.)

was made again by these defendans to have the advice of counsel of the Justice of the Peace and the Justice of the Peace replied that it was up to me. They were then later taken before a United States Commissioner.

Q. Isn't it fact that after these men were arrested on the morning of March 6th they were never permitted to interview a lawyer until they had been brought before a Justice of the Peace and charges had been placed against them and after they had been held to answer without a hearing before a United States Commissioner? A. I think—

Mr. SHEETS.—That is not the fact, they were not held to answer without a hearing.

Mr. FAULKNER.—There never was a hearing.

Mr. SHEETS.—There has not been a hearing yet as they were not held to answer.

Mr. FAULKNER.—They were held to answer by the United States Commissioner, they were brought out of their cells and said, "You are held to answer" and no testimony taken.

The COURT.—Well, never mind, dismiss all that argument, we are here to hear the facts. No evidence before the Court they were held to answer without a hearing.

I was present in the building in which the jail is contained [45] with the United States Commissioner. I was there on the 8th.

The COURT.—The point you are trying to make is, it was set without a lawyer.

Mr. FAULKNER.—Yes.

(Testimony of E. D. Bills.)

I don't know exactly how long it was after these men were arrested that they got a lawyer. It sees to me it was the following afternoon. I don't know it was on the night of the 7th at ten o'clock.

In connection with the contents of the car in addition to the gun and rope I think there was some kind of covering. I don't know whether clothes or overcoats, something of that kind, and there appeared to be a paper carton with some provisions of some sort. I don't know the amount of cartons there may have been more than one. I saw one. That was all. I was looking for the gun. There was a box of provisions in the car. I should judge a foot or 15 inches square and they had a few articles of provisions in there. I did not see any other provisions. I did not know there were eighteen steaks that were afterwards used by the jailer in Santa Rosa. I did not know until this morning when I heard that in a conversation out in the corridor.

Q. Well, your search for guns was vigilant?

A. I was pretty busy at that time, I had five men standing there in the road. I had taken a gun off one of them and was looking for other guns.

In connection with the conversations on the way in, in which I was present with the three defendants on trial, Mays may have said something I am not sure about it. I think perhaps he did. In connection with the mutual friends, I don't think there was anybody's name mentioned in connection with it, that is around my neighborhood that

(Testimony of E. D. Bills.)

I know of. I don't think he mentioned anybody's name there. [46]

In connection with the details of the conversation relative to not pressing the case, there was not much detail to it. He just said, "Isn't there some way to fix this up?" It is a fact in connection with that conversation when I brought these men in to Santa Rosa on the afternoon of the day of the arrest they were each brought separately before the district attorney. I should say it took about two minutes after we had stopped the truck until the arrival of the defendants on trial. I don't mean to say from the time we first saw them.

We first saw the truck at Monte Rio crossing the bridge and immediately started to overtake the truck. The truck when I first saw it was from here to the end of the courtroom, probably about 50 feet, possibly a little further. I was in my own automobile. I think the engine was goin*d* in my automobile. I am mistaken in my statement that it was not. I think the engine was going. When I first observed the truck it was not going very fast at that time. It had simply come off the bridge across the Russian River at Monte Rio and had a little turn to make to go into the other bridge. There are two bridges there.

Q. And at the time it was about 50 feet from you and you were in your automobile with the engine going and you overtook the truck loaded as it was about a mile and a half or two miles from Monte Rio.? A. I think not any further than that.

(Testimony of E. D. Bills.)

The first thing I did after overtaking the truck was sound my siren. When the truck came to a complete standstill I fell in back of it and got out of my car and walked up to the truck driver. I summoned them to step down and asked them what they had in their truck and did not receive any reply. I did not examine the truck at that time. I did not examine the driver's seat until after we got them out. I examined the cab of the car by looking up in there. I did not examine the contents of the truck. I did not examine the [47] contents of the truck until after I got it into Santa Rosa. I went up to the front end of the truck. I don't know whether I stopped right in front of it. Perhaps I did. I was looking for an identification slip to the truck. I did not say I searched it thoroughly because we were busy there and I wouldn't say a thorough search. Then I came back to the two defendants I had arrested and put the handcuffs on them. They were at that time standing in the road. I think at that time they were standing at the side of the truck, not either in front or back. I am not positive on that. I do not think the defendants Sanchez and Wilson were at any time in front of the truck.

After we had decided what we were going to do about bringing them in they may have gone further northward or to the rear of my automobile. At that time they had not been to the rear of my automobile. We finally decided that Shulte bring Sanchez

(Testimony of E. D. Bills.)

and Wilson in and I would bring the other defendants that are now here in. We may have decided what we would do with those two men when we first had them, not seeing the others. I don't remember what we decided to do.

Q. You know, as a matter of fact, Sheriff, that before these three men came on the scene at all you had already decided to have the truck driven in by one of the men on it?

A. No, that was after the other three men were there.

Q. After the other men came you decided to have your deputy drive it in?

A. No. First I said to Shulte, "Loosen the handcuffs on one of these men and let him drive the truck in, and you ride alongside of him."

Q. Isn't it a fact that long before Ferris and the other defendants came on the scene immediately upon placing the handcuffs on the defendant Sanchez he asked to have those handcuffs loosened?

A. Probably he asked that, anybody who ever has them put on [48] asks that question.

A. And they had to be loosened, didn't they?

The COURT.—What is all this detail for?

Mr. FAULKNER.—The element of time, he could not have done it all in two minutes.

The COURT.—Oh, that does not advise the jury for anybody to say how long this took to happen when he says he does not know. Proceed. Anything further? Any redirect?

Mr. SHEETS.—No.

(Testimony of H. O. Neilsen.)

The WITNESS.—As to whether the rifle is a machine gun, it is what we know as a machine gun. That is what it is supposed to be. Thompson gun it is called.

The COURT.—It shows for itself what it is. Call your next witness. (R., pp. 21–37.) [49]

TESTIMONY OF H. O. NEILSEN, FOR THE GOVERNMENT.

H. O. NEILSEN, produced as a witness on behalf of the United States, being first duly sworn, testified in substance as follows:

Direct Examination, Questions by Mr. SHEETS.

I am a boatswain in the Coast Guard Service. I am acquainted with the coast along the Sonoma County coast line.

Q. About how many places are there along that coast line where small boats could land?

Mr. FAULKNER.—We object to that as incompetent, irrelevant and immaterial, and not within the issues of this case, and an attempt to make a showing in connection with a violation of the Tariff law under an indictment charging the prohibition law.

The COURT.—The purpose is to show this liquor might have come in in one of those places and that is one of the circumstances in connection with the plaintiff's case. He may answer it. Overruled.

Mr. FAULKNER.—Exception.

(Testimony of H. O. Neilsen.)

The WITNESS.—Fisherman's Cove, Timber Cove, Stillwater Cove—

Mr. SHEETS.—Q. About how many, I asked you?

A. I would say about ten places marked on the chart and perhaps ten more that have no name.

Q. Do you observe this rope here, Government's Exhibit 1? A. Yes.

Q. What is a rope similar to that used for by seafaring men?

Mr. FAULKNER.—We object to that as incompetent, irrelevant and immaterial, and the proper foundation has not been laid, and not within the issues in this case.

The COURT.—Well, I think he may answer it. Overruled.

Mr. FAULKNER.—Exception.

The COURT.—What have you seen such ropes used for along the coast?

A. On my vessel and on a vessel of that size they are used for mooring lines or a tow-line. [50]

Cross-examination.

(Questions by Mr. FAULKNER.) Q. That rope can be used for anything, can't it?

A. I merely speak of my experience. I presume you can use that rope to tow a truck, as it is an automobile, I am not in the towing business but if I was towing an automobile I would not drag that line along to use on an automobile.

(Testimony of H. O. Neilsen.)

Q. It would be an ideal rope for an automobile that was mired in the mud, wouldn't it; did you ever get an automobile out of the mud? A. Yes.

Q. You would not mind having that rope to do it?

A. I would not want that kind, would not be bothered with it because a rope one-half or one-third the size would pull the car out.

Q. Yes, but you do not use the line to tow the car out do you—

The COURT.—Don't argue with him.

I am familiar with the coast line up and down the coast line of Sonoma County; I am not familiar with the highways nor the resorts nor the density of population except as I have seen from the sea. I do not know these various places I used for running liquor. I said they could, but by that I mean I would do so if I wanted to land anything. The sized boat I would use would be a dory. These are the places where I could come in with a small-sized boat.

Q. Will you describe the size of a dory to the jury? A. That depends on weather conditions.

Q. Well, the dory—

A. It would depend on weather conditions.

The COURT.—You are asked to describe a dory; now do it.

A. A dory is a small boat ranging from 14 feet to 25 with a flat bottom, and has three or four seats in it. It is made out of wood.

(Testimony of T. W. Goodman.)

In response to a question by Mr. Sheets the witness declared that the rope was approximately 90 feet long. [51] (R., pp. 37–29.)

TESTIMONY OF T. W. GOODMAN, FOR THE GOVERNMENT.

T. W. GOODMAN, produced as a witness on behalf of the United States, being first duly sworn, testified in substance as follows:

Direct Examination.

(Questions by Mr. SHEETS.)

I recognize the gin bottle marked "57147." I got it at the sheriff's office at Santa Rosa, from Sheriff Bills. I delivered it to Chemist Love. It was in my possession all the time. The bottle "57146," Scotch Whisky, I got at the Santa Rosa county jail from Sheriff Bills, and I delivered it to Chemist Love. (R., p. 39.)

TESTIMONY OF R. F. LOVE, FOR THE GOVERNMENT.

R. F. LOVE, produces as a witness on behalf of the United States, being first duly sworn, testified in substance as follows:

I received the bottle marked "57146" from Agent Goodman. I examined the contents which chemically speaking, is whisky fit for beverage purposes. There were no strip stamps or Government stamp. No Government stamp on it at all.

I received from Agent Goodman this bottle marked "57147," and examined its contents which is gin. They are both intoxicating liquors fit for beverage purposes.

Mr. SHEETS.—I ask that bottle 57146 be offered in evidence as Government's Exhibit 3.

(Bottle received and marked Government's Exhibit 3.)

Mr. FAULKNER.—We object, the proper foundation has not been laid.

The COURT.—Objection overruled.

Mr. FAULKNER.—Exception.

Mr. SHEETS.—I offer in evidence Government's Exhibit 57147 as Government's Exhibit No. 4. [52]

Mr. FAULKNER.—Same objection.

The COURT.—Overruled.

Mr. FAULKNER.—Exception.

(Bottle received and marked as Government's Exhibit 4.)

Mr. SHEETS.—At this time I wish to offer in evidence the revolver concerning which the witness testified as Government's Exhibit 5.

(Revolver marked Government's Exhibit 5.)

Mr. SHEETS.—The machine gun, ramrod and musical instrument case as Government's Exhibit 6.

The CLERK.—That is already Government's Exhibit 2 in evidence.

The COURT.—Next witness.

Mr. SHEETS.—That is the Government's case.

The COURT.—Gentlemen of the Jury, we will take a recess until 2 P. M.

(Whereupon the usual statutory admonition was given and a recess declared until 2 P. M.)

AFTERNOON SESSION—2 o'clock P. M.

The COURT.—Proceed, Gentlemen.

Mr. FAULKNER.—If the Court please, at this time on behalf of the defendants jointly and severally we move the Court for a directed verdict as to each count of the indictment upon the ground the evidence is insufficient to justify or sustain a verdict as to all or either of the defendants, as to each count in the indictment. At this point counsel for defendants agreed with the Court the motion for directed verdict and a discussion between court and counsel.

The COURT.—The motion will be denied.

Mr. FAULKNER.—Exception.

The COURT.—You may proceed with the defense.

Mr. FAULKNER.—Defendants rest.

The COURT.—You may proceed with the argument.

(Whereupon the cause was argued by respective counsel.) [53]

Mr. FAULKNER.—We ask the Court at this time to instruct the jury to disregard the statement of the district attorney in regard to the lack of contradiction in the evidence as misconduct on his part.

The COURT.—In regard to what?

Mr. FAULKNER.—On the plea of not guilty, that contradicted the charge here and the district attorney said the evidence produced by the Government was uncontradicted which is, I think, misconduct and I will ask the Court at this time to instruct the jury to disregard it.

The COURT.—That very question arose in a case that was tried before me sitting in Montana and it came down to the Circuit Court of Appeals and my instruction that it was not misconduct was upheld. The Court will qualify it, in this case, since you have mentioned it, however, by saying uncontradicted saving that presumption of innocence, and you will have it further in the instructions. You can have your exception now. The motion is denied.

CHARGE TO THE JURY.

The COURT.—(Orally.) Gentlemen of the Jury, you have heard the evidence and the argument and now it is for the Court to deliver to you the instructions or charge which, as you know, is mainly to make you acquainted with the rules of law that apply to the case and in the light of them you determine the facts. Remember, you take the law from the Court but when it comes to the facts we take the *finds* in respect thereto from you. You see the witnesses, observe their demeanor, note their story, their narrative, and it is for you to determine which witness speaks the truth, what weight will be given to the circumstances and what inferences you will draw from the circumstances that

may manifest themselves by your verdict. The Court has no power and no disposition to attempt to bind you to its opinion even when I express an opinion as to the facts and if I ever do express an opinion it is solely in the hope that in a difficult case [54] it might aid you to reason out to a correct conclusion.

However, remember, you take the law from the Court and you determine the facts for yourselves.

In this case the defendants were charged, five in number, with two offenses: First, the unlawful transportation of intoxicating liquor; and, second, with an unlawful conspiracy to accomplish that transportation. Two of these defendants have plead not guilty to both counts, if I remember right—

Mr. FAULKNER.—Interposing: Guilty, your Honor.

The COURT.—They plead guilty to both counts?

Mr. FAULKNER.—Yes.

The COURT.—And they are not now on trial. The other defendants have plead not guilty. You will remember this indictment is not evidence against the defendants. It is merely the written charge so that they and all of us may know what is being tried to-day. The other defendants on trial, Marino, Ferris and Finney have plead not guilty and that raised in their behalf the presumption of innocence commencing on the trial.

You and I know nothing about their innocence. Don't know whether they are innocent or guilty. We should not know anything about that because we are neutral, umpires, judges; you are judges

of the fact, I of the law. At the outset the defendants are presumed to be innocent and that presumption of innocence requires you shall acquit them unless after you have considered all other evidence in the case it is your judgment that the presumption of innocence is overcome to a degree which leaves you satisfied they are guilty as charged beyond any reasonable doubt.

The burden is on the Government to prove the guilt of the defendant beyond a reasonable doubt or you are bound to acquit them. But remember, the Government is not bound to prove guilt beyond all doubt as that is impossible. Nothing can be proven beyond all doubt [55] from the witness stand, so in order that ample law may be administered to society the law says it suffices to prove it beyond a reasonable doubt.

After you have reviewed all the evidence in the case or of the transactions that are a part and parcel of it if you have not a persistent judgment that to a very high degree of probability the defendants are guilty as charged, you have a reasonable doubt and you will give them the benefit of it and acquit them. On the other hand after a review of all the evidence if you have a persistent judgment to a very high degree of probability that the defendants are guilty as charged you have no reasonable doubt and you will convict them. The probabilities, however, must not be mere suspicions, not mere surmises, conjectures, or an appeal to the doctrine of chances but must rest fully upon the evidence of the case from the testimony of the wit-

nesses and the circumstances which have been introduced.

Another way the courts sometimes put it, not as clear in my judgment, is that unless guilt is manifest to you to a moral certainty and an abiding conviction there is a reasonable doubt and you will acquit. In other words, if you have not an abiding conviction which is nothing more or less than a persistent judgment to a moral certainty which is nothing more or less than a high degree of probability the defendants are guilty as charged you have a reasonable doubt.

It is not for the defendants to prove their innocence. They have a right to and did in this case stand silent and offered no evidence whatever in their defense other than the presumption of innocence. The law gives them that right and the law says further that it shall not be commented upon by the district attorney and another thing you will draw no inferences adverse to them by reason of the fact they exercised their right to remain silent and it still devolves upon the Government to prove them guilty beyond a reasonable doubt. [56]

It is not a question with you whether these defendants are innocent or guilty. However, the question always is are they proven guilty beyond a reasonable doubt. If you do not believe them proven guilty by the evidence beyond a reasonable doubt you must acquit them.

The credibility of witnesses is for you. There is not muc*y* dispute between the witnesses but in criminal cases the credibility of witnesses is always for

you to determine. You observe them, their demeanor, their manner of knowing what they are testifying about, their likel*y*hood to have an accurate memory and their honesty, in reporting it to you. The interest of witnesses when there is any manifest must always be taken into account. There is a presumption that witnesses speak the truth and yet in many cases you may see reason why you would not accord such a presumption to any witness and if you see reason for it, not mere arbitrary caprice, it is for you to say whether you believe them or not. The determination is always left to the jury in respect to the truthfulness and the credibility of witnesses. You determine the credibility of witnesses the same as you do in business and you take some pride in your knowledge of human nature, knowing when men are dealing fair with you and in the same way you determine it with reference to men in the business world you determine it with reference to witnesses upon the stand.

Now, Gentlemen of the Jury, the charge is, first: That the defendants engaged in unlawful transportation of intoxicating liquor. There is such a thing as lawful transportation of liquor but it is never legal unless those transporting it have a permit from the commissioner of Internal Revenue Department to do so. There is no evidence in this case that the defendant had a permit but you can, if you see fit, ascertain from the circumstances whether or not this was a lawful transportation. You may look at the character of the locality where

it was being transported. There can be no legal transportation of liquor for beverage purposes at any time. A permit is never issued to transport liquor for beverage purposes. You may look at the nature [57] of the liquor. On its face it appears to be foreign liquor, whiskey. The whiskey is branded "Scotch production," I think, and the gin is branded as Holland production, Dutch production.

There is a presumption whenever liquor is found in the possession of anyone that the possession is for unlawful purposes, namely for sale or otherwise unlawfully furnishing it to anyone so in so far as this liquor was found in the possession of those defendants who have plead guilty the presumption is that they had possession unlawfully and so they were likewise transporting it unlawfully.

If from all the circumstances in the case you arrive at a conclusion the liquor was being unlawfully transported then it is for you to say whether these defendants had any part in that act. That is a vital issue in this case. It is not necessary in the commission of any crime that the men on trial should have actually committed it with their own hands. One may commit a crime by his associate, his partner therein, or his agent, just the same as in civil life you may perform acts by your agent, your servant, your associate, or partners. Whatever one partner does in civil business in the furtherance of that business all partners are liable for. So in crime whenever one of the defendants aided and abetted by another's agents, servants or

partners, they are all just as guilty as those who commit the deed. If one partner engaged in a place of business to rob that place they are all equally guilty. So if you find there was an engagement and an association between all these defendants, those two who have plead guilty and the three who have not, to unlawfully transport this liquor then these defendants are as guilty of the charge as those who had heretofore plead guilty.

The next charge is conspiracy to unlawfully transport liquor. They conspired, engaged together, to commit some act forbidden by the law, some unlawful act and *though although* not all are found at the [58] immediate commission of the crime for engagement in it, if they had a prearrangement to that end all are equally guilty and guilty of the conspiracy. When it is charged, as here, to an unlawful end, conspiracy is often difficult to prove. Rarely will you find anyone to testify to you that he heard them agree to arrange to do something or to operate together in this criminal project. You rarely find it set out in writing. The law says it may be inferred from the circumstances of the case and it must be proven by circumstances or from evidence beyond a reasonable doubt before a jury can find the defendant guilty of conspiracy. The agreement, arrangement, need not have been expressly set out in words. It may be understood and inferred from the conduct of the parties associated together as shown by the evidence.

And now we come to the facts of this case. Well, in respect to that, the relationship of the parties, their acquaintance, their mutual acts leading to some end in so far as you find any in connection with the case.

Now, Gentlemen of the Jury, coming to the facts of this particular case and the evidence. You have heard it. It is very brief. The sheriff and deputy apparently, whether they heard the bottles jingle or not, had good reason to believe the two men who have plead guilty passing in a truck had liquor and they followed them down the road near a place called Monte Rio. After pursuing them for some distance they stopped them and they find they have a great deal of intoxicating liquor upon which were no appropriate Government stamps and they tell you what happened while they waited there. They say after about two minutes these men manifest some nervousness, desired to move aroung in the rear of the truck. The sheriff says the auto drove along with the other three defendants who are on trial in it. The deputy testified they stopped this auto with the three defendants and compelled them to get out into the road. They found one of the [59] defendants, Ferris, armed with a loaded revolver and they found lying in the front of the auto a machine gun, which passed for a machine gun in this state, fully loaded and ready for operation although there was a case in the auto with a ramrod and some cartridges in it.

There is very little, apparently, conversation as far as reported to you here. There is nothing to

disclose that these defendants now on trial and those that have plead guilty had any prior acquaintance. There is no oral testimony on that. There is nothing to disclose the fact that they manifest any signs of acquaintanceship there at the time when they were all together in the presence of the two officers. There is nothing to show any conversation between the defendants. Particularly the sheriff that testified when he was riding into town in the auto that they denied they had any acquaintance with these two men who had been found actually driving the truck in which the liquor was found. The deputy says that they did not say anything about that but as he and the deputy separated in going to town the deputy driving the truck and the sheriff in the other auto with these three men in the other auto that may be why the deputy tells you he heard nothing of that sort. The sheriff says he did, Mr. Finney was asked in the sheriff's office and Finney denied it there that he had any acquaintance with the two men taken with the truck.

But there are some circumstances which the Government points to as serving to show the association of these men together and the guilt of all of them. That is in the statements which the sheriff and the deputy say these men made in reference to the gun. They were guilty of violating the state law by the mere possession of that gun and guilty of a very serious offense under which they might receive a very heavy punishment, namely a fine not to exceed five thousand dollars

or imprisonment not to exceed three years or both. The mere possession of that sort of a gun is a serious offense in [60] this state. You can see those men are shown by the Government to have it for no innocent purpose but to explain the presence of the gun they were asked what they were doing with it by the sheriff and he says that Ferris, the defendant, told him "It is not for you officers, it is for high-jackers." Now, if you don't understand, you must have that term "High-Jacker" in mind, it is generally understood in the vernacular. The sheriff further testifies that when he asked Marino what he had it for, if he had it for fun, Marino said he had it for target shooting, to shoot quail with and he said it was *said,* his attitude when he made that answer was very serious.

The testimony further is if there is anything for you to discover as to the connection in the case that all these men except Wilson wore clothes, Wilson is the one who plead guilty, isn't he?

Mr. FAULKNER.—Wilson and Sanchez.

The COURT.—All except Wilson were dressed in black jeans, overalls. Wilson was on the truck. He was in some sort of whipcord trousers and another pair of those overalls was found in the truck. My recollection is the same were tainted with sand. Another piece of evidence is this rope which was found in the auto in which were these defendants and it is said to you by one of the witnesses that this rope discloses traces of green paint like the green paint that the truck appeared to be colored with. Then it was testified that rope could be used

in connection with autos. I don't know whether the theory of the Government is this rope was used on the axle of the automobile for pulling in boats. I don't know that. Perhaps it is. But anyhow you give it any consideration, if any, you believe it is entitled to. It is rather a heavy rope for ordinary towing of trucks or autos. However, that would be for you to say whether it was any part or parcel of this conspiracy or whether an incriminating circumstance or not.

The sheriff further testifies that he was coming into town with [61] the defendants and one of these defendants on trial, Ferris, wanted to know if the matter could not be fixed up. Now at that time the sheriff was intending, he says, to charge these men who were found in the auto with the unlawful possession of these firearms. I take it it is unlawful to carry a concealed weapon. Ferris had it and you may say he had the machine gun because it lay in the auto, it was right at the feet of Marino and Ferris, and he intended to charge them with that. Could it have been the defendants were endeavoring to dissuade the sheriff from charging them with that. That is a matter for you to determine. Were they guilty of the liquor as well as of the guns and were they speaking in reference to that as well as in reference to the guns. It is fair to say that in so far as that standing alone is concerned it is just as consistent with the fact that they wanted to be protected from that charge in reference to the gun as to the charge in reference to the liquor, more consistent perhaps. If that was

the only fact in the case that would not be an incriminating circumstance at all because there was enough in the gun charge to encourage them to fix it up with the sheriff and they used that language to disclose to him they did not mean the guns but to run through that liquor and as they had been taken there in the immediate presence of the liquor and whether they thought they were being charged with that is a matter you can consider for yourselves.

The sheriff further says Ferris told him they had mutual friends in that county and that he had understood the officers in that county were all right for them to go through there. Again that standing alone might relate as much to the guns as to the liquor unless there was some other way from wherever they had been using these guns for them to go home through some other county.

The Government has introduced some evidence about the coast nearby and that liquor could be landed there. These people were coming from that general direction. One of the officers so testified but it [62] is wholly immaterial where they did come from if it was unlawful liquor and being unlawfully transported and if there was a conspiracy to effectuate it.

It is in evidence also that these defendants, two of them in the auto, Ferris and Marino, gave false names. In that connection in furtherance of any illegal enterprise may be inferred but it would be as desirable, no doubt, if possible, to use false names to protect themselves from the terrors of

the law for them to use false names in connection with these unlawful guns as it would be in connection with unlawful liquor upon the thought of them being prosecuted.

As far as the defendants on trial are concerned the evidence is what is termed circumstantial evidence. They have produced no one who has seen them in possession of the liquor or giving directions for it to be transported or anything whatever except a series of circumstances which the Government contends is sufficient to warrant you finding them guilty beyond a reasonable doubt, and they ask you to do so. In circumstantial evidence the rule is this. If the circumstances are as consistent with the innocence of the defendants of this particular crime here to-day as it is with their guilt you are bound to acquit them because that serves to raise a reasonable doubt in their behalf. If the circumstances in the case aren't as consistent with the innocence of these men of the charge against them to-day as of their guilt it will be your duty to convict them. It will be for the state to say what shall be done with respect to the unawful possession of the guns wherein some charge has already been made against them. I think the evidence has disclosed that.

So, Gentlemen of the Jury, that is the case for you. Before you can find the defendants guilty it will be for you to determine, first, beyond a reasonable doubt that the liquor was being unlawfully transported, if you find it was. Second, whether or not these defendants on trial had any

prearrangement and understanding with the [63] defendants who were transporting the liquor and that it should be so transported, and if you find that proven beyond a reasonable doubt your verdict should be one of guilt. If you don't find those two issues proven beyond a reasonable doubt your verdict must be not guilty. When you retire to the jury-room you will select one of your number as foreman and proceed to a verdict. It takes twelve to agree to any verdict in this case. Any exceptions?

Mr. FAULKNER.—Your Honor, may I respectfully except to the Court's failure to give Instruction Number 10, and I think under the rule I must designate it further. In connection with the burden of proof that the liquor was illegally possessed—

The COURT.—(Interposing.) Oh yes, I told the jury the burden of proof all through this case is on the Government to prove the liquor was being unlawfully transported, and to prove these defendants on trial were conspiring with the others to transport it.

Mr. FAULKNER.—Your Honor gave an instruction in substance that that proof could be gained from circumstances, might I respectfully suggest to your Honor that the proof is obtained from the obtaining or nonobtaining of a permit and that proof is in the hands of the Government and the failure to offer that can't be offset by circumstances.

The COURT.—Motion denied.

Mr. FAULKNER.—Exception.

The COURT.—You may retire.

(Whereupon the jury retired to deliberate upon their verdict and subsequently returned into court with a verdict of guilty against each defendant on both counts.) [64]

That the instruction proposed by defendants, and discussed subsequent to the charge of the Court and the failure to give which was excepted to was in words as follows:

> "In determining the guilt or innocence of these defendants upon the charge of conspiracy alleged in the indictment, I charge you that the burden was upon the government in this case to prove to a moral certainty and beyond a reasonable doubt that the contents of the automobile truck referred to in the evidence in this case was at said time being illegally transported.

That upon the rendition of the verdict the defendants herein moved for a new trial, which said motion for a new trial was in the words and figures as follows:

"(Title of court and cause.)

Now comes the above named defendants, Joe Ferris, Frank Finney and Freddie Marino, and move the Court to set aside the verdict herein and grant a new trial, and as reasons therefor show to the Court the following:

I.

The verdict is contrary to the law of the case.

II.

The verdict is not supported by the evidence in the case.

III.

The Court, upon the trial of the case, admitted incompetent evidence offered by the United States.

IV.

That the Court improperly instructed the jury to the substantial prejudice of said defendants.

V.

That the Court improperly refused, to the substantial prejudice of said defendants, to give correct instructions on the law tendered by said defendants.

VI.

The Court erred in refusing to direct a verdict of Not Guilty at the close of all evidence by the United States."

(Date and signature of counsel for defendants.)

[65]

That said motion for a new trial was by the Court denied to which ruling defendants excepted.

Thereupon the defendants Ferris, Finney and Marino were called to the bar and the Court pronounced the following judgment and sentence: That each defendant be confined at McNeils Island penitentiary of the United States for a period of fifteen months at hard labor and that the defendants above named and other defendants not on trial be fined jointly the sum of Three thousand dollars.

The above bill of exceptions contains all of the evidence oral and documentary, and all of the proceedings relating to the trial of these defendants and all matters considered by court and jury in the trial other than the exhibits which are incapable of being copied herein or otherwise made a part hereof.

Dated: March 27, 1929.

JAMES B. O'CONNOR,
HAROLD C. FAULKNER,
Attorneys for Appealing Defendants. [66]

[Title of Court and Cause.]

STIPULATION RE EXHIBITS.

It is hereby Stipulated by and between the attorneys for the United States of America and the attorneys for the defendants herein that the exhibits introduced in evidence at the trial of the above-entitled cause and now in the custody of the Clerk shall be deemed included as a part of the foregoing bill of exceptions with the same effect in all respects as if incorporated in the said bill of exceptions.

It is further stipulated that all exhibits introduced at the trial of the above-entitled cause may be marked by the Clerk of the above-entitled court and filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: April 23d, 1929.

GEO. J. HATFIELD,
United States Attorney,
ALBERT E. SHEETS,
Assistant United States Attorney,
JAMES B. O'CONNOR,
HAROLD C. FAULKNER,
Attorneys for Defendants. [67]

[Title of Court and Cause.]

STIPULATION SETTLING BILL OF EXCEPTIONS.

It is hereby stipulated by and between the respective parties hereto that the foregoing bill of exceptions on behalf of the defendants Joe Ferris, Freddie Marino and Frank Finney, and each of them upon appeal herein to the Circuit Court of Appeals in and for the Ninth Circuit has been duly presented within the time allowed by law and the rules and orders of this Court duly and regularly made in this behalf and the same is in proper form and conforms to the truth and that it may be settled, allowed and signed and authenticated by the Court as the true bill of exceptions herein, on behalf of said defendants and each of them and that it may be made a part of the record in this cause.

Dated: April 23d, 1929.

GEO. J. HATFIELD,
United States Attorney,
ALBERT E. SHEETS,
Assistant United States Attorney,
JAMES B. O'CONNOR,
HAROLD C. FAULKNER,
Attorneys for Defendants. [68]

[Title of Court and Cause.]

ORDER SETTLING, ALLOWING, SIGNING AND AUTHENTICATING THE BILL OF EXCEPTIONS AND MAKING SAME PART OF THE RECORD.

The foregoing bill of exceptions duly proposed by said defendants Joe Ferris, Freddie Marino and Frank Finney, and each of them, and duly agreed upon by the respective parties thereto, having been duly presented to the Court within the time allowed by law and by the rules and orders of this Court, duly and regularly made in their behalf, is hereby settled, allowed, signed and authenticated, as in the proper form and as conforming to the truth and is the true bill of exceptions herein, and is hereby made a part of the record in this case.

It is further ORDERED that the exhibits introduced in evidence in the trial of the above-entitled cause and now in the custody of the above-entitled court, shall be deemed to be included as a part of

the foregoing bill of exceptions, with the same effect and in all respects as if incorporated in said bill of exceptions, provided, printing not waived unless by order of the C. C. A.

It is further ORDERED, that said exhibits be marked by the Clerk of the above-entitled court in a manner to identify them and thereupon filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: April 30, 1929.

BOURQUIN,
United States District Judge.

[Endorsed]: Filed May 3, 1929. [69]

[Title of Court and Cause.]

NOTICE OF PRESENTATION OF BILL OF EXCEPTIONS.

To the United States Attorney, and to the Plaintiff Above Named:

Take notice, you and each of you that the bill of exceptions in the above-entitled matter stipulated by you to be correct, will be presented forthwith to the Honorable George M. Bourquin, District Judge, at Butte, Montana.

Dated: April ——, 1929.

JAMES B. O'CONNOR,
HAROLD C. FAULKNER,
Attorneys for Appealing Defendants.

Due service and receipt of copy of the above notice is hereby admitted this 27th day of April, 1929.

GEO. J. HATFIELD,
U. S. Attorney,
ALBERT E. SHEETS,
Assistant U. S. Attorney.

[Endorsed]: Filed Apr. 27, 1929. [70]

[Title of Court and Cause.]

STIPULATION CONSOLIDATING APPEALS, ETC.

IT IS HEREBY STIPULATED by and between plaintiff and the appealing defendants in the above-entitled action that the appeals of the respective filing defendants from the judgments, and each of them, of the above-entitled court, made and entered in the above-entitled cause against them, and each of them, on March 25, 1929, may be presented to the United States Circuit Court of Appeals, in and for the Ninth Circuit, as one appeal, and be presented on one record, and prepared, presented and considered as the joint record of the filing defendants, including one assignment of errors and one bill of exceptions.

Dated, March 27, 1929.

GEO. J. HATFIELD,
ALBERT E. SHEETS,
Attorneys for Plaintiff.
JAMES B. O'CONNOR,
HAROLD C. FAULKNER,
Attorneys for Defendants.

[Endorsed]: Filed Mar. 27, 1929. [71]

[Title of Court and Cause.]

STIPULATION EXTENDING TIME TO AND INCLUDING APRIL 17, 1929, TO PREPARE, SERVE AND FILE AMENDMENTS TO PROPOSED BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED AND AGREED by and between plaintiff and appealing defendants herein, that plaintiff may have to and including April 17th, 1929, within which to prepare, serve and file their amendments to the proposed bill of exceptions on file herein.

IT IS FURTHER STIPULATED that the above-entitled court may enter an order pursuant to this stipulation dated as of April 6th, 1929.

Dated April 8th, 1929.

GEO. J. HATFIELD,
Attorney for Plaintiff.
JAMES B. O'CONNOR,
HAROLD C. FAULKNER,
Attorneys for Defendants.

Pursuant to the foregoing stipulation, it is SO ORDERED as of April 6th, 1929.

HAROLD LOUDERBACK,
United States District Judge.

[Endorsed]: Filed Apr. 10, 1929. [72]

[Title of Court and Cause.]

STIPULATION EXTENDING TIME TO AND INCLUDING APRIL 27, 1929, TO PREPARE, SERVE AND FILE BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED by and between plaintiff and appealing defendants herein, that said defendants may have to and including April 27th, 1929, within which to prepare, serve, file and present their engrossed bill of exceptions in the above-entitled cause.

Dated: April 8th, 1929.

GEO. J. HATFIELD,
Attorney for Plaintiff.
JAMES B. O'CONNOR,
HAROLD C. FAULKNER,
Attorneys for Defendants.

Pursuant to the foregoing stipulation, it is SO ORDERED.

HAROLD LOUDERBACK,
United States District Judge.

[Endorsed]: Filed Apr. 10, 1929. [73]

[Title of Court and Cause.]

STIPULATION EXTENDING TIME TO AND INCLUDING APRIL 27, 1929, TO PROPOSE AMENDMENTS TO BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED AND AGREED that the plaintiff may have to and including the 27th day of April, 1929, within which to propose amendments to defendants' proposed bill of exceptions in the above-entitled action, and have the same settled.

Dated: April 17, 1929.

HAROLD C. FAULKNER,
JAMES B. O'CONNOR,
Attorneys for Defendants.

Upon the foregoing stipulation, it is so ORDERED.

HAROLD LOUDERBACK,
United States District Judge.

[Endorsed]: Filed Apr. 19, 1929. [74]

[Title of Court and Cause.]

STIPULATION EXTENDING TIME TO AND INCLUDING MAY 7, 1929, TO PREPARE AND FILE BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED AND AGREED that the defendants may have to and

including the 7th day of May, 1929, within which to prepare and file their engrossed bill of exceptions in the above-entitled action, and have the same settled.

Dated April 17, 1929.

GEO. J. HATFIELD,
United States Attorney,
Attorney for Plaintiff.
HAROLD C. FAULKNER,
JAMES B. O'CONNOR,
Attorneys for Defendants.

Upon the foregoing stipulation, it is SO ORDERED.

HAROLD LOUDERBACK,
United States District Judge.

[Endorsed]: Filed Apr. 19, 1929. [75]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of Said Court:

Sir: Please prepare transcript on appeal to include the following pleadings, motions, proceedings and orders in the above-entitled cause:

1. Indictment.
2. Record of the trial.
3. Verdict of the jury.
4. Motion for new trial of defendants Ferris, Finney and Marino.

5. Sentences and judgment.
6. Notice of appeal.
7. Petition for appeal, and supersedeas and order allowing same.
8. Assignment of errors.
9. Bill of exceptions.
10. Order settling and allowing bill of exceptions.
11. Notice of presentation of bill of exceptions.
12. The stipulations and orders extending time to settle bill of exceptions and extending term, and all stipulations relating to appeal and exhibits.
13. Citation on appeal.
14. This praecipe.

JAMES B. O'CONNOR,
HAROLD C. FAULKNER,

Attorneys for Defendants Ferris, Finney and Marino.

[Endorsed]: Filed May 10, 1929. [76]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify the foregoing 76 pages, numbered from 1 to 76, inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of United States of America vs. Joe Ferris et al., No. 3679—Criminal, as the same now remain on file and of record in this office; said transcript having been prepared pur-

suant to and in accordance with the praecipe for transcript on appeal, copy of which is embodied herein.

I further certify that the cost of preparing and certifying the foregoing transcript on appeal is the sum of thirty-one and 70/100 ($31.70), and that the same has been paid to me by the attorneys for the appellants herein.

Annexed hereto is the original citation on appeal.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 22d day of May, A. D. 1929.

[Seal] WALTER B. MALING,
Clerk,
F. M. Lampert,
Deputy Clerk. [77]

CITATION ON APPEAL.

UNITED STATES OF AMERICA.—ss.

The President of the United States of America, to the United States of America, GREETING:

You are hereby cited and admonished to be and appear at a United States Circiut Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, or record in the Clerk's office of the United States District Court for the Northern District of California, wherein Joe Ferris and Freddie Marino and Frank Finney,

are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable GEORGE M. BOURQUIN, United States District Judge for the Northern District of California, this 27th day of March, A. D. 1929.

BOURQUIN,
United States District Judge.

Service of the within citation and receipt of copy thereof is hereby admitted this 27th day of March, 1929.

ALBERT E. SHEETS,
D.
Asst. United States Attorney.

[Endorsed]: Filed Mar. 27, 1929. [78]

[Endorsed]: No. 5827. United States Circuit Court of Appeals for the Ninth Circuit. Joe Ferris, Freddie Marino and Frank Finney, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed May 23, 1929.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5827

14

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

JOE FERRIS, FREDDIE MARINO and FRANK FINNEY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

GEO. J. HATFIELD,
United States Attorney.

ALBERT E. SHEETS,
Asst. United States Attorney.
Attorneys for Appellee.

Neal, Stratford & Kerr, S. F.

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CASES CITED

No. 5827

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

JOE FERRIS, FREDDIE MARINO and FRANK FINNEY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

JURISDICTION

This case comes here on appeal from a verdict of guilty rendered against the defendants Ferris, Marino and Finney (since deceased) tried before the Honorable Geo. M. Bourquin, Judge, sitting at Sacramento, California.

SPECIFICATIONS OF ERROR

The specifications of error have been narrowed and consolidated, and are:

I. The evidence is insufficient to support the verdict. (Assignment of Errors No. 13, (R. 24.)

II. The Court erred in admitting in evidence the conduct of defendants Wilson and Sanchez after their arrest, which conduct was not in the presence of appellants. (Assignment of Errors Nos. 1, 2 and 7.)

III. The Court erred in admitting in evidence the testimony concerning the proximity of places along the coast line where small boats could be landed, (Assignment of Errors Nos. 6, 8 and 9) and erred in admitting in evidence testimony concerning the uses to which the rope in the automobile occupied by appellants could be used. (Assignment of Errors No. 10)

IV. The Court erred in instructing the jury that they could from the circumstances of the case without other evidence determine whether a permit had been issued to transport the liquor on the truck. (Assignment of Errors No. 15.)

INDICTMENT

The indictment charges the three appellants with two others (Sanchez and Wilson, who have already pleaded guilty to both counts); the first, with unlawfully transporting a number of cases of liquor and gin fit for and intended for beverage purposes in violation of Sec. 3, Title II of the National Prohibition Act; and second, with conspiracy to commit the same offense in violation of Sec. 37 C. C., and so too these are the only two statutes involved in the appeal.

STATEMENT OF THE CASE

Since the principal argument urged by appellants is directed against the sufficiency of the evidence to sustain the verdict, and the facts are all contained in the brief story of the four witnesses, their testimony is submitted for a summary of the facts, and is as follows:

William A. Shulte, a witness on behalf of the United States testified as follows:

I am a deputy sheriff of Sonoma County and on the 6th day of March, 1929, at 8:30 o'clock in the morning had occasion to stop a truck containing whiskey and gin on a road out from Monte Rio a short way. We were stopped at the Russian River Bridge at Monte Rio around 8:30 in the morning and a G.M.C. truck, about two and a half tons, came across the bridge into Monte Rio and right at the end of the bridge the road was very rough and it crossed the road, and we could hear bottles rattling in the closed part. It was covered with canvas.

We stopped the truck about a mile and a half out of Monte Rio. We came up alongside it and as we pulled up alongside the sheriff blew his siren and then dropped back of the truck and stopped and we stood alongside the truck and ordered the two men out, one getting out on each side. We handcuffed them together. Their action at that time was very nervous. After being handcuffed together, they had got pretty well forward, *they kept edging back toward the rear of the truck, there was about fifteen steps between the car and the place where they had*

been, they kept watching down the road, the way they had come. They edged around the back of the truck. I ordered them back a couple of times and about the time they got back I looked down the road. They got back clear to the (29) right-hand corner of the truck, then I ordered them back again, that is right to the left rear corner of the truck, by the road alongside of the truck. Then I got behind them and I looked down the road myself and I seen this car coming and the men looked very tired, and rough looking, and I said, "For Christ's sake, Doug, here comes the rest of the gang." At that moment I was standing right behind the prisoners who were between me and the coming automobile. The sheriff was standing along the road by the side of the truck, the left side of the truck to my right. The prisoners would be in line between him and the automobile. We were pretty well lined up the road. As the car came up I pulled my gun and the sheriff walked out and waived the car down. The car stopped in the middle of the road at the command of the sheriff. I kept the car covered all the time as it passed me with my gun and the sheriff ordered Williams, the driver of the car, out of the car, and he got out on the left-hand side and I was standing just with the two men then in the middle of the road and as he got out the left-hand side I hollered to him, I said "You better get the other man out," and he walked around the front of the truck with Williams and got the other man by the name of Mays out of the truck. Mays is Marino. Mays is the name he gave us there and later he gave the name of Freddie Ma-

rino. The driver gave the name of Williams to our office and later gave the name of Joe Ferris. They are the two defendants, Marino and Ferris, here charged, the two on my left looking down. After he walked around the right-hand side and opened the door Mays got out and he searched Mays and asked him if he had a gun and he said, "No." Williams said, "I have a gun sheriff, and I will get it for you." The sheriff says, "No, keep your hands out of your pocket, I will get it." And he took the gun, put his hand in his pocket and took out a gun, a 38 Colts loaded. The sheriff took the gun out of his pocket and handcuffed them two men together and (30) says to me—I then walked around the car to the left-side and he says: "Bill, get that rifle." I reached in and pulled it out, muzzle to me and the gun was laying that way, and pulled it out, and I seen it was a Thompson machine gun and said to Doug, "Christ sake, Doug, it is a machine gun." We looked around and he says, "What have you got that thing with you for?" Williams said, *"Well, we haven't got that for you, Sheriff, we have got that for high-jackers."* Mays spoke up a little later and says, *"We have been hunting," and stated that he had taken the machine gun to hunt quail.* He said it seriously, no smiles. The sheriff looked in the rear seat and seen Finney, the man sitting on my right at the table, laying in the back of the front seat, and was asleep or pretended to be, and he ordered him out and he started to get out the right side and he said, "Get out this side." He got out and as he got out he says, "Well, I am not going to

stay here, you have got nothing on me, I am going to get out of here," and started down a little road that was opposite the car, on the right-hand side of the car. I ordered him back. He had gone about 25 or 30 feet, and he came back and stood there a few minutes and then says, "I am going home," and started down the road and right there we give him plain language to stop or he would be brought back right. *Finney tried to get away twice.* We found 151 cases of gin and 19 sacks of Scotch whiskey in the truck. It did not have any United States Government strips stamps on it. It was similar to this whiskey bottle and gin bottle. (31) There were some other different kinds of Scotch whiskey and gin in there. I delivered some of it to a federal prohibition agent, Mr. Goodman. I found a big coil of rope in the automobile. The rope you show me is the same coil of rope. *The truck was painted green. There is green on this rope, on one end of it, exactly the same as the paint on the truck.* That case you show me was in the rear of the automobile. This (displaying a gun), was in that case. The gun was in the front seat laying right on the floor-board. The ram rod was in the case. There was 20 shells in the clip. The clip that was in the gun at the time shot 20 shots. Mays was in the car with the gun right at his feet. The gun was in the same condition as it is now. The gun fires with or without the shot. At that time the stock was on it. At that point where we stopped the automobile and the truck it is forty miles from the Pacific Coast. Within a radius of 40 miles there are ten places along there

that the boats could land. Ten or more. There was some sand in the rear part of the automobile. Other than the rope, gun and sand there was in the automobile, a roll of blankets, a bed for one man, and also some steaks and some provisions. I should say two or three meals. There was some canned goods. I never counted them, four or five. There were no boxes (33) that I saw.

The time between the presence of the two defendants on trial and the overtaking of the truck, was two or three minutes, no more. The truck was a mile or a mile and a half from Monte Rio. With reference to the entrance to Bohemian Grove it was north of a place called Tyrone. In connection with it being south of the entrance to Bohemian Grove, you don't go near the entrance to Bohemian Grove, going towards Duncan's Mills. The road does not follow the river. After leaving Monte Rio it goes in a southeasterly direction on the easterly side of the river. I would approximate the speed of the truck when we first observed it as going very slow. When we overtook the truck I would say the truck was traveling 38 miles an hour.

The sheriff drove his car up alongside where he could see the two men at the cab of the truck, blew the siren and dropped back to the rear when the truck came to a standstill. We were about 15 feet to the rear. I first got out to the right-hand side as he was driving and he got out right afterwards. I then walked up to the truck and had some conversation with the men in it. They then stepped

down. They were ordered down, one from each side. The men were then handcuffed together. Before handcuffing them we searched them. In the meantime the sheriff's car was standing right where it always stood. During the entire period of time I have testified to the sheriff's car was always at the back of the truck. *No other machine or truck passed while we were there before the* (34) *defendants came.* A sedan automobile did not pass. No cars or trucks or any kind passed between the time the Nash came up and the time we stopped the other truck. No automobile went either way. At the time Williams made the statement in connection with the gun, by Williams is meant Ferris, the persons present were Ferris, Marino, the sheriff and myself and the two boys on the truck and Finney was supposed to be asleep on the back seat of the sedan. The statement was made to the sheriff in my presence in response to a question. The sheriff asked him what he had this gun for. He asked that question of Williams. As to whether Mays had the gun, it was in the front seat on the floor. The first time I seen the machine gun was when the sheriff told me to take that rifle out from under the front seat, in front of the front seat. That was after the defendants here on trial were handcuffed. I was on the right-hand side at the rear of the automobile, on the right-hand side when Marino got out of the car. I did not notice the rifle at that time. I was back too far. I (35) handcuffed Marino and Ferris and the discussion in regard to the rifle was right after that. We had not started to Santa Rosa at that time. Mr.

Ferris, the man called Williams, said "That is not for you Sheriff, that is for high-jackers." *The defendant I mentioned trying to run away was Finney.* He never was handcuffed. We just happened to run out of handcuffs, that was the point.

There were no questions asked by the sheriff in my presence of any of the three defendants on trial in connection with whether they knew any of the men on the truck.

Four of the men had on black jeans, black overalls. The fifth one was Wilson. He had on a pair of, I think Khaki pants or whipcord pants and high shoes. We found an extra pair of black jeans where he had been riding, similar to the ones the other men were wearing. The condition of the extra pair of pants was wet and sandy. There was a mattress in the car. I would not say three boxes of provisions. I am kind of faint on how much provisions were in the car, I would not say. There was not a great deal.

E. D. Bills, a witness on behalf of the United States, testified—

I am a sheriff of Sonoma County and about 8:30 on the morning of March 6th I had occasion to seize a truck containing 151 cases of gin and Scotch whiskey near Monte Rio. I should say a mile and a half or two miles out of Monte (38) Rio. We saw the truck pass by and cross over a little bridge near us and heard bottles rattling in it and figured it out and about a mile or mile and a half, something of

that sort, we overtook it and pulled up alongside of it and I gave them the siren and slowed down, they slowed down and I pulled in behind them to the side of the road and stopped and got out of the truck, or out of the machine and went up to the truck. The deputy sheriff and myself both went up to the truck and I said to them, "What have you fellows got here." We ordered them out of the truck and they got out in the road. There was liquor in the truck covered by a canvas. About 151 cases I think of whiskey and several cases of gin, similar to these two bottles you have in your hand. I turned them over to the prohibition agent named Goodman.

These two defendants stepped around in behind the truck. The car was (39) stopped about 15 or 20 feet back of the truck and they stepped in back of the truck or the side of the road so he ordered them back into the road where we were.

Then I was looking at the truck and went to the front end of the truck to see if I could find an identification certificate in it. I looked up the road. The time that elapsed between the time I stopped them and the time I looked up the road along the way they had come was perhaps two minutes, a couple of minutes. I saw a closed car coming. A sedan automobile. It looked to be a Nash, I think they call it a Nash 400. It is a big Nash. Shulte and the two men were near the rear end of the truck. I was near the front end. They were all in the road. The two prisoners were ahead of me and Shulte at the time the car was sighted so they were between me

and the car. As the car pulled up to us Shulte pulled his gun and I think he motioned to them to stop. I am not sure. He covered them with his gun.

I motioned to the car to stop myself, stepped out in the road and they slowed down and I ordered them over to the side of the road ahead of the truck and we all went up to the front end of the car and the driver of the Nash car opened the door and looked out and he ordered them out of the car, told them to get out into the road. We got him out and went around the front end of the car and got the other man out.

The driver gave his name as Frank Williams. His name is Joe Ferris. I see him at the table here. *The other man gave his name as Jack Mays. His name is Fredie Marino.* With respect to what I did to Mays when he got out of the car, I wanted to find out if they had guns and I asked him if he had a gun and he said no and I searched him. The deputy sheriff at that time had covered him with his gun, kept watching the men. I searched May. He said he did not have a gun. I searched Williams as soon as I searched Mays. (40)

He said, "Well, Sheriff, I have a gun and I will get it for you," and started to reach into his overcoat pocket, he was wearing an overcoat, and he reached in there and I took hold of his hand and I said, "Never mind, keep your hand out of your pocket, I will get it myself," and I took it myself.

I then handcuffed these two prisoners together. I then discovered a third man. After he had gone

around to the other side of the machine, the side where Mays was sitting, I saw the stock of a gun lying in the bottom of the car. I thought it was a rifle at the time. As soon as we had gone around the other side of the car I said to Shulte, "Get that rifle out of the car." About that time I looked in the back end of the car and discovered the other man in there apparently asleep and I said, "Have you any guns in here?" and he said, "No." I said, "You get out of there," and he started to climb out the right side of the car and I said, "Get out on this side." And then he got back and came out the same side where we were.

Finney tried to escape. He walked down the road and got started and got about 20 feet before Shulte ordered him back. He tried to escape again. He started up the road. I didn't handcuff him because I did not have any more handcuffs. When I told Shulte to get the gun out of the car he stepped over to the car and started to take the gun out and he was pulling it out with the muzzle toward him on the left side of the car, the driver's side. He said, "My God, it's a machine gun." I said, "What are you fellows doing with this Thompson gun in your car? What is the idea of having a machine gun in here on a trip like this?" Ferris said, "Well, Sheriff, we did (41) not have that for you officers we had it for high-jackers."

Mays said, "We have been up the coast camping. We have been camping." I said, "I suppose you have been camping with this, you have been out for a little

business with this in your camping trip." He said, "Well, we used it for target practice."

I think he said something about shooting quail. That is the gun there. That is the revolver I took from Ferris and that is the ram rod that is within the case. That is the case I found in the back of the car. *I think it is some kind of a musical instrument case.*

All these men had on dark colored clothes. I think their pants were sort of black jeans, I think they call them. All were the same kind but one. There was one man who had, a man named Wilson on the truck, had on a pair of high-topped lace shoes and I think khaki pants. There was a pair of black jeans found in the truck where Wilson was riding.

I saw this rope, Government Exhibit 1, in the car between the front and back seat. The truck was painted green. The sedan dark blue.

An air line would probably be six or eight miles to the coast from where these men were arrested. There are several places a boat could land on the coast. I don't know how many there would be, but a number of places, I think. I know of one other place where I have seen liquor that has been landed. (42)

This automobile was coming from that general direction. I put these three defendants in my automobile and started to town. *Well, Ferris repeated again they did not have the gun for officers, they had it for hi-jackers,* and he wanted to call up some-

body in San Francisco. He wanted to know if I would let him call up somebody. I said, "This is no time now to talk about it, you cannot call up anybody now, wait until you get in to Santa Rosa. You can do it then." He also made a remark about knowing some people in Sonoma County they thought were friends of mine. *Ferris wanted to know if there was not some way of fixing it up. He also said, "I thought the officers in this county were all right to come through here."* I said, "Where did you get any idea of that kind?" I said, "You come through here in broad daylight and right under a man's nose and do you expect him to stand for that?" The machine gun was loaded.

The conversation I just related in connection with fixing this up and referring to mutual friends of himself and myself was, I think, with Mr. Ferris. The reason I say think was because he seemed to be doing most of the talking. Conversation was had by me with Mr. Ferris. He was sitting in the back seat. Finney was sitting in the front seat. I did not fix it up with him.

In this conversation between myself and the defendants on the way in I intended at that time to charge them with the illegal possession of fire arms. That is the only offense I ever charged them with. I think the three of them were charged with the possession of a machine gun. Ferris was also charged with having in his possession a concealed weapon. That is the only charge I have ever placed against these three defendants in Sonoma County. *The num-*

ber of times reference was made to hi-jackers by the defendants was probably twice. The occasion of referring to it the second time was in the course of conversation as I have already stated. As to whether I asked the questions, I don't remember exactly. I think perhaps it is a fact that the first question I asked defendant Ferris was "Have you anything to do with these men on the truck?" When I first apprehended him his answer if I asked him that question was that he did not know them. During the entire time he was in my custody I probably asked him the same question on several different occasions and of course he denied he knew them. I did not believe him.

We placed the charge against the men who had the liquor in their possession at the time and placed the charge in connection with fire arms against these defendants on trial.

I think the following day Ferris was brought before the Justice of the Peace on the gun charge.

In connection with the contents of the car in addition to the gun and rope I think there was some kind of covering. I don't know whether clothes or overcoats, something of that kind, and there appeared to be a paper carton with some provisions of some sort. I don't know the amount of cartons there may have been more than one. I saw one. That was all. I was looking for the gun. There was a box of provisions in the car. I should judge a foot or 15 inches square and they had a few articles of provisions in there. I did not see any other pro-

visions. I did not know there were eighteen steaks that were afterwards used by the jailer in Santa Rosa. I did not know until this morning when I heard that in a conversation out in the corridor. I was pretty busy at that time, I had five men standing there in the road. I had taken a gun off one of them and was looking for other guns.

In connection with the conversations on the way in, in which I was present with the three defendants on trial, Mays may have said something I am not sure about it. I think perhaps he did. In connection with the mutual friends, I don't think there was anybody's name mentioned in connection with it, that is around my neighborhood that I know of. I don't think he mentioned anybody's name there. (46)

In connection with the details of the conversation relative to not pressing the case, there was not much detail to it. He just said, "Isn't there some way to fix this up?" It is a fact in connection with that conversation when I brought these men in to Santa Rosa on the afternoon of the day of the arrest they were each brought separately before the district attorney. I should say it took about two minutes after we had stopped the truck until the arrival of the defendants on trial. I don't mean to say from the time we first saw them.

We first saw the truck at Monte Rio crossing the bridge and I immediately started to overtake the truck. The truck when I first saw it was from here to the end of the courtroom, probably about 50 feet, possibly a little further. I was in my own automobile.

I think the engine was going in my automobile. I am mistaken in my statement that it was not. I think the engine was going. When I first observed the truck it was not going very fast at that time. It had simply come off the bridge across the Russian River at Monte Rio and had a little turn to make to go into the other bridge. There are two bridges there.

The first thing I did after overtaking the truck was sound my siren. When the truck came to a complete standstill I fell in back of it and got out of my car and walked up to the truck driver. I summoned them to step down and asked them what they had in their truck and did not receive any reply. I did not examine the truck at that time. I did not examine the driver's seat until after we got them out. I examined the cab of the car by looking up in there. I did not examine the contents of the truck. I did not examine the contents of the truck until after I got it into Santa Rosa. I went up to the front end of the truck. I don't know whether I stopped right in front of it. Perhaps I did. I was looking for an identification slip to the truck. I did not say I searched it thoroughly because we were busy there and I wouldn't say a thorough search. Then I came back to the two defendants I had arrested and put the handcuffs on them. They were at that time standing in the road. I think at that time they were standing at the side of the truck, not either in front or back. I am not positive on that. I do not think the defendants Sanchez and Wilson were at any time in front of the truck.

As to whether the rifle is a machine gun, it is what we know as a machine gun. That is what it is supposed to be. Thompson gun it is called.

H. O. Neilsen, a witness on behalf of the United States testified—

I am a boatswain in the Coast Guard Service. I am acquainted with the coast along the Sonoma County coast line. There are about ten to twenty places along that coast line where small boats could land. On my vessel and on a vessel a rope such as this one and of that size is used for mooring lines or a tow-line. I would not want that kind for a tow-rope for an automobile and would not be bothered with it because a rope one-half or one-third the size would pull the car out. I do not know these various places are used for running liquor. I said they could, but by that I mean I would do so if I wanted to land anything. The sized boat I would use would be a dory. These are the places where I could come in with a small-sized boat. A dory is a small boat ranging from 14 feet to 25 with a flat bottom, and has three or four seats in it. It is made out of wood.

T. W. Goodman, a witness on behalf of the United States, testified—

I recognize the gin bottle marked "57147." I got it at the sheriff's office at Santa Rosa, from Sheriff Bills. I delivered it to Chemist Love. It was in my possession all the time. The bottle "57146," Scotch Whisky, I got at the Santa Rosa county jail from Sheriff Bills, and I delivered it to Chemist Love.

R. F. Love, a witness on behalf of the United States testified—

I received the bottle marked "57146" from Agent Goodman. I examined the contents which chemically speaking, is whisky fit for beverage purposes. There were no strip stamps or Government stamp. No Government stamp on it at all. I received from Agent Goodman this bottle marked "57147" and examined its contents which is gin. They are both intoxicating liquors fit for beverage purposes.

I

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT.

(a) *The evidence in this case is not subject to review.*

The appellants do not have their record before the Court in such shape as to raise any question concerning the insufficiency of the evidence. Consider that portion of the record which follows:

"Mr. Sheets. That is the Government's case.

The Court. Gentlemen of the Jury, we will take a recess until 2 P. M.

(Whereupon the usual statutory admonition was given and recess declared until 2 P. M.)

AFTERNOON SESSION—2 o'clock P. M.

The Court. Proceed, Gentlemen.

Mr. Faulkner. If the Court please, at this time on behalf of the defendants jointly and severally we move the Court for a directed verdict as to each count of

the indictment upon the ground the evidence is insufficient to justify or sustain a verdict as to all or either of the defendants, as to each count in the indictment. At this point counsel for defendants agreed with the Court the motion for directed verdict and a discussion between court and counsel.

The Court. The motion will be denied.

Mr. Faulkner. Exception.

The Court. You may proceed with the defense.

Mr. Faulkner. Defendants rest.

The Court. You may proceed with the argument.

(Whereupon the cause was argued by respective counsel.) (R. 61-62)

The Government rested its case, the defendants made a motion for directed verdict which was denied, they were directed by the Court to proceed with their case, and they failed to renew their motion. It was thus the case went to the jury. The right to question the sufficiency of the evidence upon appeal upon such a a record was thereby waived.

O'Brien Manuel, Federal Appellate Practice, p. 33 and note.

(b) *The evidence is sufficient.*

The appellant has taken the circumstantial evidence of the Government's case to pieces, and then in turn dissected those parts, to support its argument that the evidence is insufficient to support the verdict. Not *the* circumstances, but those component parts of *a* circumstance, have then been separately exposed to the well

known rule that a circumstance as susceptible of an innocent equally with a guilty inference is not evidence of guilt. By that specious method of arguendo reasoning appellants have concluded they were convicted of a crime of which there was no evidence.

In the same way it may be said that the fact of a man waving a baton in his hand indicates nothing, but when the man moves the baton over an empty hat and a rabbit jumps out that circumstance indicates, at least beyond a reasonable doubt, that the man is a magician. The proposition that where evidence in the case is as consistent with the innocence of the defendant as with his guilt it is the duty of the trial judge to grant a directed verdict, or that a fact or circumstance as consistent with innocence as with guilt has no probative value, is the holding of the courts in the cases cited in support of that principle by appellant and is not disputed.

Dickerson v. United States (8th) 18 Fed. (2d) 887, for instance was a case in which the Government proved the existence of a conspiracy to transport liquor and then proved that the plaintiff in error purchased liquor from the conspirators and nothing more, which the Court properly held was but one circumstance which standing all alone as it did failed to prove the plaintiff in error to have participated in the unlawful agreement and an essential of the crime, pointing out that purchasing of liquor was not a crime, and thus that fact alone was robbed of any value in its proof of a conspiracy to transport.

Turnietti v. United States (8th) 2 Fed. (2d) 15

as another example was a case in which the defendant owned the apartment where the still was found, lived in a nearby adjacent one, paid for the water used by both, and must have known of the existence of the still, which the Court properly held is not evidence that the landlord conspired, but is merely a suspicion that he may have had knowledge of what the real criminal was doing.

Those are typical of the cases cited by appellants in the argument, by which he holds up, one by one, the facts in minutia and claims for them an innocent inference.

Transportation of, or conspiracy to transport, liquor of course, may not be proved by any one of the innocent or dissected circumstances of a Graham truck, or a Nash sedan, or smuggled liquor, or two pairs of black jeans in a truck, or three pairs of the same kind of black jeans in a Nash, or sand on a wet pair of jeans, or sand in a Nash car, or a tow rope for boats in a Nash sedan, or green paint on the axle of a truck, or the identical green paint on the end of a tow rope for boats, or a machine gun loaded and ready for action, or the statement "we had the machine gun for high-jackers."

Each circumstance and object separated and placed by itself ought, of course, to mean nothing. But put those circumstances and objects harmoniously together, as the evidence does, and the transformation is a startling picture of a truck containing smuggled whiskey and its convoy of armed desperadoes.

Thus arranged those facts are: that a truck with a green painted axle driven by two defendants, one wearing black jean pants and containing a pair of wet sand-dusted ones for the other, going at a high rate of speed, with a huge quantity of smuggled whiskey and gin was overhauled on a brush-hidden but well-traveled road within a forty-mile radius of from ten to twenty places on the Pacific Coast where such contraband could have been landed; that these two defendants, instantly placed under arrest, commenced to look anxiously down the road along which they had come and to move for cover behind the truck; that almost instantly from the direction in which the truck had come, and without any other vehicle intervening, came a large Nash sedan in which rode the appellants, all wearing black jeans the same as those of the two defendants on the truck and each of whom on arrest gave a fictitious name; that Ferris, with a revolver in his coat, was driving the sedan and Marino with a machine gun loaded, ready for immediate use, was in the front seat with him, and in the back seat was a huge ninety-foot coil of three-inch rope weighing not less than one hundred fifty pounds, with green paint on the end where the tie would be, identical with the green paint on the axle of the truck containing the whiskey, also sand, food, a saxaphone case for the machine gun, bed roll, bedding and appellant Finney simulating sleep; that the Sheriff of Sonoma County and his Deputy, using the two arrested defendants as a screen, at the point of their guns stopped and searched the Nash; that Ferris said in the presence of all of them, and twice in the presence of appellants, referring to the machine

gun, "Well, we haven't got that for you, Sheriff, we have got that for high-jackers;" That Finney tried twice to make his escape; that on the way to the jail Ferris in the presence of appellants said "I thought the officers in this county were all right to come through here."

The facts and circumstances of the Government's case show clearly and convincingly the appellants' connection with the transportation. The coincidence of time and place and purpose with the presence of appellants—unexplainable on any theory of innocence—are all united. Corroboration was complete with the appellants' admission that they had the gun for "high-jackers." High-jackers are men who steal whiskey. The only whiskey in the vicinity of appellants was on the truck just ahead of them. There was no other whiskey appellants could have been protecting from "high-jackers." After hearing such a case it is not strange that even in the face of instructions which give not the slightest indication of the views of the Court the jury found sufficient evidence of guilt.

II

THE COURT ERRED IN ADMITTING IN EVIDENCE THE CONDUCT OF DEFENDANTS WILSON AND SANCHEZ AFTER THEIR ARREST, WHICH CONDUCT WAS NOT IN THE PRESENCE OF APPELLANTS.

This specification is without force. The conspiracy was still in progress so long as the appellants in the Nash sedan were in the rear of the truck to protect it with the machine gun. Sanchez and Wilson knew this fact, and that the machine gun would be laying

down its barrage momentarily. Consequently they looked in the direction from which their co-conspirators and the whiskey truck's deliverance was to come, and at the same time sought cover to the rear of and behind the truck from the shooting which would commence when the Nash arrived. When the shooting was over the truck would continue. So that the appearance and conduct of Sanchez and Wilson testified to occurred not only while the conspiracy was still in existence but in a very real way was contributing to a furtherance of that conspiracy. Had the Sheriff and his Deputy not placed Wilson and Sanchez between them and the machine gun unquestionably the Sheriff and his deputy would both have been killed.

The ruling of the Court on this evidence does not violate but follows the authorities of *Kuhn v. United States,* 26 Fed. (2d) 463; *Toffanelli v. United States,* 28 Fed (2d) 581, cited by appellants.

Sanchez and Wilson acted as they did in furtherance of the conspiracy at a time when the conspiracy was not only on but approaching the climax for which appellants had the machine gun.

III

THE COURT ERRED IN ADMITTING IN EVIDENCE THE TESTIMONY CONCERNING THE PROXIMITY OF PLACES ALONG THE COAST LINE WHERE SMALL BOATS COULD BE LANDED, AND ERRED IN ADMITTING IN EVIDENCE TESTIMONY CONCERNING THE USES TO WHICH THE ROPE IN THE AUTOMOBILE OCCUPIED BY APPELLANTS COULD BE USED.

On the truck with the green axle along with the whiskey was found a pair of wet sand-sprinkled black

jeans. In the Nash, among other things, were found sand and a huge rope, ninety feet long, about three inches or more in diameter, weighing not less than one hundred fifty pounds, with green paint at the end where the tie would be, identical with that on the axle of the truck. Of what use could an automobile of campers be making of such a rope? Clearly none. Then it became very material to know for what purpose such a rope could be used. An explanation of the huge rope was like the explanation which one makes who understands a machine or trade terms.

Pope v. Filley, 3 Fed. 69 reversed but not on this point.

Such explanations may, of course be, and generally are, made by lay witnesses who understand the subject or object.

Wigmore on Evidence (2nd Ed.) 571.

And the tow rope was not one used by automobiles —it was one used by seamen for towing boats—"*Dories.*" (R. 59)

Fleishman v. Irwin, 5 Fed. (2d) 167, page 169.

But the Nash with the tow rope and sand, and the whiskey truck were on an open road. How could either the appellants in the Nash or the truck with smuggled whiskey use such a rope in such a place? That question was as material and almost as important as it was to know what the appellants were doing, for that would answer in part the business of the appellants at the time. Therefore, evidence which replied to such a question showing the Nash was within forty miles

of from ten to twenty places where boats could land on the Pacific Coast was proper. It did not, "draw the attention of the jury from the actual issues," *Sparks v. Ter. of Oklahoma,* 146 Fed 371, cited by appellants but answered a very proper question in the minds of the jury on a material fact. The ruling upon this question by the trial court was proper. But more than that on the only two specifications of error raised with respect to the evidence the questions were clearly within the wide latitude of discretion accorded to the trial court.

Wigmore on Evidence, 2nd Ed. 561, 571.

IV

THE COURT ERRED IN INSTRUCTING THE JURY THAT THEY COULD FROM THE CIRCUMSTANCES OF THE CASE WITHOUT OTHER EVIDENCE DETERMINE WHETHER A PERMIT HAD BEEN ISSUED TO TRANSPORT THE LIQUOR ON THE TRUCK.

The indictment upon which the appellants were tried charged them in two counts with (1) Transportation of Intoxicating liquor in violation of Sec. 3, Title II, N. P. A., and (2) Conspiracy to transport liquor in violation of Sec. 37, U. S. C. C.

Upon the strength of *Linden v. United States* 2 Fed. (2d) 817, appellants urge that the trial court erred when it instructed the jury as follows:

> "Now, Gentlemen of the Jury, the charge is first: That the defendants engaged in unlawful transportation of intoxicating liquor. There is such a thing as lawful transportation of liquor but it is never legal unless those transporting it have a permit from the Commissioner of Internal

Revenue Department to do so. There is no evidence in this case that the defendant had a permit but you can, if you see fit, ascertain from the circumstances whether or not this was a lawful transportation. You may look at the character of the locality where it was being transported There can be no legal transportation of liquor for beverage purposes at any time. A permit is never issued to transport liquor for beverage purposes. You may look at the nature of the liquor. On its face it appears to be foreign liquor, whiskey. The whiskey is branded "Scotch production," I think, and the gin is branded as Holland production, Dutch production.

"There is a presumption whenever liquor is found in the possession of anyone that the possession is for unlawful purposes, namely for sale or otherwise unlawfully furnishing it to anyone so in so far as this liquor was found in the possession of those defendants who have plead guilty the presumption is that they had possession unlawfully and so they were likewise transporting it unlawfully.

"If from all the circumstances in the case you arrive at a conclusion the liquor was being unlawfully transported then it is for you to say whether these defendants had any part in that act."

It will be seen that the Court was instructing the jury upon the first count in the indictment relating to the substantive offense of transportation in violation of the National Prohibition Act, and in so doing kept within the direction of the *Linden* case which in fact he had before him. No reference is made to the count of conspiracy in this part of the charge to which exception is taken. Concerning its application to the first count of the indictment not even appellants do or could object. So that his specification does not point at or attack the conviction upon the first count.

Coming then to the second and conspiracy count, the proof of the fact of an absence of a permit to transport liquor is not limited to any one form. It may be proved in any manner of several ways. The circumstances clearly indicated that the appellants had no permit to transport the liquor. It was foreign liquor. It was being transported secretly by the two men who were in its immediate custody who had already plead guilty. It was liquor which showed upon its bottles no evidence of a permit—that is, that it was not medicinal liquor—but, on the contrary affirmatively showed itself to be foreign liquor smuggled—with but one use—beverage. The circumstances did in fact clearly establish the total absence of any permit.

The *Linden* case does not announce a rule of evidence or measure the quantum of proof to establish the absence of a permit to transport liquor in a conspiracy case. On the contrary it announces a rule of law that in a conspiracy count there must be affirmative evidence of the absence of a permit. In its instruction the Court did not violate but recognized that rule and the proof of the Government met the issue. This specification is without basis either in law or of fact.

CONCLUSION

The evidence in this case is not only sufficient but clear and convincing of guilt; the only rulings questioned are upon matters almost wholly within the discretion of the trial court upon which it correctly ruled; and the instructions are singularly free from the slightest trace of leaning either way—with the appellants

if at all—and legally supported by the only authority cited by the appellants in their attack upon but the single point. The appeal is without any merit.

Respectfully submitted,

GEO. J. HATFIELD,
United States Attorney.

ALBERT E. SHEETS,
Assistant United States Attorney.

No. 5827

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOE FERRIS, FREDDIE MARINO and FRANK FINNEY,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' PETITION FOR A REHEARING AND FORMAL APPPLICATION FOR STAY OF MANDATE.

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No. 5827

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vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' PETITION FOR A REHEARING.

To the Honorable Frank H. Rudkin, and to the Honorable Frank S. Dietrich, and to the Honorable Curtis D. Wilbur, Circuit Judges of the United States Circuit Court of Appeals for the Ninth Circuit, and to the Honorable Frank H. Norcross, District Judge, sitting as Judge of said Circuit Court:

The petition of appellants for a rehearing of the above entitled cause, respectfully shows:

Two questions presented by this appeal were decided by Your Honorable Court adverse to these appellants, each of which, appellants respectfully contend, is erroneous:

First: The decision of your Honorable Court decides adversely to appellants their contention that "it was error to admit testimony concerning the con-

duct of defendants Sanchez and Wilson following their arrest, which conduct was not in the presence of appellants.

Second: The decision of your Honorable Court decides adversely to appellants their contention referred to in the opinion in the following language: "It is contended that the Court erred in admitting in evidence the testimony concerning the proximity of places along the coastline where small boats could be landed."

FIRST.

IT IS URGED THAT IT WAS ERROR TO ADMIT TESTIMONY CONCERNING THE CONDUCT OF THE DEFENDANTS SANCHEZ AND WILSON FOLLOWING THEIR ARREST WHICH CONDUCT WAS NOT IN THE PRESENCE OF APPELLANTS.

The foregoing is the language of your Honorable Court and correctly states the legal proposition involved.

No question arising in the trial of a conspiracy case is fraught with more difficulty than the question of admissibility of the acts or declarations of a co-conspirator outside the presence of a defendant on trial. Trial Courts in this district have consistently held that the conspiracy ends with the arrest of the conspirator. In the case at bar, the witness Shulte was about to narrate statements made by Sanchez and Wilson. Thereupon the following objection was made, and the following ruling was had:

> "Mr. FAULKNER. Before any reply is given to that we wish to object to any statements made by Sanchez or Wilson out of the presence of the

parties here on the ground it is hearsay and the proper foundation has not been laid and any conspiracy, if any existed, has terminated.

"The COURT. *Yes, nothing in relation to these other defendants,* if they said anything, you don't assume they did, as a matter of fact you don't assume they said anything about the other defendants?"

The conduct of the defendants Sanchez and Wilson recited by the witnesses on behalf of the government occurred after the truck which they had been driving had been overtaken and stopped by the sheriff and his deputy, the defendants Sanchez and Wilson requested to step down from the truck, and *after Sanchez and Wilson had been handcuffed together.* (R. 30.) Under these circumstances, your Honorable Court has ruled upon the admissibility of evidence of their conduct as follows:

"However, in the case at bar we are of the opinion the conspiracy was not terminated even as to Sanchez and Wilson upon their arrest. *The object of the conspiracy was the successful transportation of contraband liquor.* The means adopted to carry that object into execution was the *actual transportation by defendants* Sanchez and Wilson driving and accompanying the loaded auto truck under the convoy of appellants equipped with a machine gun and Colt revolver. Until the convoy was hors de combat by the arrest of appellants the conspiracy was not terminated as to any of its participants."

It is respectfully urged that this ruling, upon analysis, is erroneous. In Carson's "The Law of Criminal Conspiracies and Agreements," a part of Wright's "Criminal Conspiracies," pages 212 and 213, it lays down a rule that the admission of evidence

concerning the acts or declarations of co-conspirators in the following precise language:

> "It is upon this principle of a common design that the acts and declarations of co-conspirator, and acts done at different times and by different individuals are admitted in evidence against those prosecuted, as whatever is said or done by any one of the number, in furtherance of the common design becomes a part of the *res gestae,* and is the act of saying of all. * * * *Care must be taken, however, to limit the evidence to acts and declarations done and made while the conspiracy was pending, and in furtherance of the design;* they must be concomitant with the principal act, and so connected with it as to constitute a part of the *res gestae.* Detached acts, or stray statements, or loose admissions made by one, either before the conspiracy was formed, or after it had been consummated, would not be admissible, unless, in some conclusive way, brought home to two or more of the defendants. It is the principle of *agency,* which, when once established, binds the conspirators together, and makes them mutually responsible for the acts and declarations of each."

In discussing the admissibility of acts or declarations by co-conspirators, 3 *Greenleaf Evidence,* Section 94, declares as follows:

> "And here, also, as in those cases the evidence of what was said and done by the other conspirators *must* be limited to the acts and declarations made and done while the conspiracy was pending and *in furtherance of the design;* what was said or done by them before or afterwards not being within the principle of admissibility."

It is to be borne in mind in passing that the admission of this type of evidence is an exception to the general rule that it is hearsay and as such exception should be strictly construed.

In *State v. Larkin,* 49 N. H. 44, we find this language:

> "But this proposition is to be received, subject, *always* to the limitation that the acts or declarations admitted by those, only, which were made and done during the pendency of the criminal enterprise and in furtherance of the criminal object."

In the case of *Patton v. State,* 6 Ohio St. 467, the conspiracy charged was a fraudulent combination between Patton and Arnold in obtaining a contract for rebuilding a bridge. A witness testified Arnold made certain declarations implicating Patton in the fraudulent enterprise at or about and on the same day the money for the bridge was paid. The Court held:

> "Whether the conspiracy shall be deemed to have continued until the money was actually paid Arnold or not, or whether the latter declarations were made before or after he actually received either the order or the money, seem wholly immaterial. In any case, it cannot be claimed that the declarations of Arnold to Hilts were made in furtherance of the unlawful enterprise or accompanied any act done in accomplishment of the common design."

In the case at bar, your Honorable Court has declared the conspiracy was not terminated at the time of the arrest of Sanchez and Wilson. Yet in the very next sentence, your Honorable Court declares the object of the conspiracy was the successful transportation of contraband liquor. *The object of this conspiracy was completely terminated.* The liquor had been seized, was in the custody of the peace officers of the State of California, and the men were handcuffed. Your Honorable Court next declares

that the role played by Sanchez and Wilson in this conspiracy was to actually transport the liquor. Their participation had physically and definitely and positively ended.

We respectfully urge that the principles of law laid down repeatedly and consistently in the cases supported by the text writers is modified by your Honorable Court's opinion to the extent that it is actually destroyed when your Honorable Court declared:

> "Until the convoy was hors de combat by the arrest of appellants the conspiracy was not terminated as to any of its participants."

The danger of this principle as a law of evidence in this Circuit is apparent when it is considered that it is not qualified in any way and that if the rule is good for five minutes after the arrest of Sanchez and Wilson, it is good for five days after their arrest.

Your Honorable Court in its opinion refers approvingly to the language of the Supreme Court of the United States in the case of *Logan v. United States*, 144 U. S. 263, at 308. Under the very case cited by your Honorable Court, the acts or declarations of Sanchez and Wilson were clearly inadmissible for therein said Court, in addition to the language repeated verbatim in your opinion, declares as follows:

> "After the conspiracy has come to an end, whether by success *or by failure*, the admissions of one of the participants by way of narrative of past facts, are not admissible in evidence against the others."

If the object of this conspiracy was the successful transportation of contraband liquor, it had failed

when the liquor had been taken possession of by the peace officers of the State and the drivers of the truck removed therefrom and actually handcuffed.

Further, the conduct of Sanchez and Wilson depicted in the Record as follows:

> "The WITNESS. We handcuffed them together and in a matter of two minutes——
>
> Mr. SHEETS. What was their action at that time?
>
> A. Very nervous.
>
> The WITNESS. After being handcuffed together they had got pretty well forward, they kept edging back toward the rear of the truck, there was about fifteen steps between the car and the place where they had been, they kept watching down the road, the way they had come.
>
> The WITNESS. They edged around the back of the truck. I ordered them back a couple of times and about the time they got back I looked down the road. They got back clear to the right-hand corner of the truck, then I ordered them back again, that is right to the left rear corner of the truck, by the road alongside of the truck."

was not and is not an act of Sanchez and Wilson in furtherance of the common design which is set forth in your Honorable Court's opinion as the successful transportation of contraband liquor.

The rule laid down by your Honorable Court justifying the admission of the acts of Sanchez and Wilson renders erroneous the rule of the trial judge that their declarations were inadmissible. If Sanchez and Wilson had engaged the peace officers arresting them in conversation after they had been arrested and handcuffed, we feel certain that your Honorable Court, without hesitation, would have declared that the conversations were not admissible because they

were no longer talking as agents of an enterprise, but were speaking in their own behalf because of their altered conditions resulting from their arrest, and your ruling would have been that nothing they could have said under those circumstances out of the presence of these appellants could bind them. If this be true, there can be no distinction between an act and a declaration. Each must occur while the conspiracy is pending and be made or done in furtherance of its object.

There is no element in this of a conspiracy with a dual object, one of which is accomplished and another unfulfilled, as for instance, a conspiracy to steal money and to divide the profits of the theft, in which latter type case, the conspiracy is deemed to exist until the division of the proceeds.

This principle inartificially expressed by the writer of this brief, is well expressed by the Supreme Court of the State of California in the case of *People v. Opie,* 123 Cal. 294, at page 296:

> "William Opie and Edward Opie were jointly charged. William Opie was upon trial. Conceding the evidence established a conspiracy between these two parties to commit the crime of grand larceny, still the court committed error in allowing evidence to be introduced as to the appearance, the conduct and the declarations of Edward Opie, the defendant, not upon trial. It is elementary law that such evidence as to a coconspirator not upon trial partakes of the character of pure hearsay. This evidence was all directed toward matters occurring after the commission of the offense—after the conspiracy was accomplished and ended. There is not even the excuse for its admisison that the defendant on trial was present at the time. This court has

had occasion many times, and recently, to advert to the error of similar judicial action. (People v. Moore, 45 Cal. 19; People v. Dilwood, 94 Cal. 89; People v. Oldham, 111 Cal. 652.) Without question it may be said that this evidence was extremely prejudicial to defendant, and its admission demands a new trial of the case. The attorney general attempts to meet the force of these objections by saying that the conspiracy was not ended when the events occurred which this evidence disclosed. It is said the conspiracy was not ended because the property stolen had not yet been distributed between the thieves. This is no answer, for there is no evidence disclosing that it had not been distributed at the time; and again, there is no evidence that it was ever intended that it should be distributed. In certain cases where the conspiracy discloses an intention to divide the property to be stolen, evidence of the acts and declarations of a co-conspirator taking place any time prior to the division are admitted. This is upon the theory that the conspiracy does not end until that time. The present case discloses nothing of that kind."

Your Honorable Court has relied upon the ruling of the Supreme Court in the *Logan* case, supra. There was far more reason to have declared the conspiracy there claimed to have existed, to have still been in existence at the time of the making of the statements by Johnson, than in the case at bar.

In the *Logan* case, the crime charged was a conspiracy to injure and oppress certain men in the custody of the United States marshal, which crime resulted in numerous indictments which are reviewed in the opinion. You will note that the Supreme Court held the conspiracy ended when the mob was actually dispersed, on the 19th of January, 1889, when two of

the Marlows mentioned in the opinion were killed. On the night of January 19th, Johnson was supposed to have made certain declarations that Logan, one of the appellants and a co-conspirator was present, at the raid on the prisoners. The Supreme Court could well have said, if all parties to the conspiracy should be rendered *hors de combat,* that the conspiracy still existed, because the opinion discloses that on the day following the 19th, Collier, one of the conspirators and another large body of men collected at the Denson farm to again capture the surviving Marlows.

In the light of the facts in the *Logan* case, it is respectfully urged that your Honorable Court has departed from rather than followed the rule in the *Logan* case.

Counsel has been diligent in his examination of authorities on this subject. Nowhere has he been able to find authority for the proposition set forth in the opinion of your Honorable Court that all parties to the conspiracy must be *hors de combat* before acts or declarations of arrested conspirators are deemed inadmissible.

SECOND.

IT IS CONTENDED THAT THE COURT ERRED IN ADMITTING IN EVIDENCE THE TESTIMONY CONCERNING THE PROXIMITY OF PLACES ALONG THE COAST LINE WHERE SMALL BOATS COULD BE LANDED.

In disposing of this contention, your Honorable Court uses the following language:

> "It is contended that the court erred in admitting in evidence the testimony concerning the

proximity of places along the coast line where small boats could be landed. It is clear, we think, error was not committed in the admission of this testimony. We have here as an established fact a truck upon a highway within a few miles of the coast line carrying a very considerable load of contraband liquors bearing foreign labels. The amount and character of the merchandise is readily suggestive of its unlawful entry by boat at some convenient coast point. Under such circumstances the jury is entitled to consider the topography of the adjacent country in connection with other facts and circumstances established in the case."

In the case of *Niederluecke v. United States,* 21 Fed. (2d) 511, the Court declared:

> "But these presumptions are too violent and irrational to sustain a conviction of a serious offense, and the permissible basis of a presumption must be a fact and *one presumption may not be the basis of another presumption.*" Wagner v. U. S. (C. C. A.), 8 Fed. (2d) 581, 586, and cases there cited."

Your Honorable Court has recently in the case of *Sturdevant v. United States,* 36 Fed. (2d) 562, definitely and positively laid down the rule that one inference will not support another inference. Your specific language in the *Sturdevant* case is as follows:

> "The jury might perhaps infer from the testimony that the cargo was stolen or embezzled by the appellants, for this would be only a reasonable inference from the facts and circumstances in the case, but such an inference, based on circumstantial evidence alone, will not support the further inference that the motorboat was cast away or destroyed in order to conceal the theft or embezzlement, because the rule is well settled that one inference will not support another. The

> theft or embezzlement of the cargo might, no doubt, disclose a motive for the destruction of the motorboat, but a person cannot be convicted of a crime on motive and theory alone, however plausible the theory may be, without other or further support in the evidence."

In the case at bar your opinion declares that because the truckload of liquor bore foreign labels, it is readily suggestive of unlawful entry by boat at some convenient coast point. When your Honorable Court used the term "readily suggestive," it was another expression to say a reasonable inference. Based upon that inference, your Honorable Court has in this case approved the admission of evidence, not that liquor was being landed in the vicinity of the seizure of this truck, but that *small boats* were capable of landing. Upon the inference that this is smuggled liquor, your Honorable Court has permitted the further inference to be drawn that it was smuggled in the vicinity of the place of the seizure of the truck, and from these inferences, one bottomed on the other, the Court has permitted a still further inference that these defendants participated in the actual smuggling of the liquor.

It is respectfully urged that in so doing your Honorable Court has departed from the rule in this Circuit laid down in the *Sturdevant* case, and that the facts in this case cannot be legally distinguished therefrom.

CONCLUSION.

It is respectfully urged that this petition be granted.

Dated, San Francisco,
June 11, 1930.

JAMES B. O'CONNOR,
HAROLD C. FAULKNER,
Attorneys for Appellants and Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellants and petitioners in the above entitled cause, and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
June 11, 1930.

HAROLD C. FAULKNER,
Of Counsel for Appellants and Petitioners.

FORMAL APPLICATION FOR STAY OF ISSUANCE OF MANDATE

for the Purpose of Applying to the Supreme Court of the United States for the Issuance of a Writ of Certiorari.

Counsel for appellants herein heretofore in open Court applied for a stay of the mandate in order to file a petition for a writ of certiorari in the Supreme Court of the United States. This application was by your Honorable Court denied.

Counsel for the appellants respectfully applies for a stay of mandate in the within cause in case this petition for rehearing is denied.

In support of the application, appellants respectfully urge that the foregoing petition and their brief on file herein are in the judgment of counsel for appellants meritorious and filed in good faith. That among other things a proper question for review by the Supreme Court of the United States is presented in this: That your Honorable Court has in the case at bar failed to follow the law of evidence as expounded by the Supreme Court of the United States in the *Logan* case, supra.

Wherefore, appellants pray that in the event of a denial of their petition, mandate be stayed for a period of thirty days or such other reasonable time as the Court may deem fit and proper in order that

they may file and docket in the Supreme Court of the United States a petition for writ of certiorari.

Dated, San Francisco,
June 11, 1930.

JAMES B. O'CONNOR,
HAROLD C. FAULKNER,
Attorneys for Appellants and Petitioners.

No. 5828

United States

Circuit Court of Appeals

For the Ninth Circuit.

E. MASSAGLI, Doing Business as SAN FRANCISCO CONCRETE CO., and Also as SAN FRANCISCO CONCRETE & MOSAIC WORKS, Alleged Bankrupt,

Appellant,

vs.

T. I. BUTLER CO., a Corporation, J. S. GUERIN and STEPHEN I. GUERIN, Copartners, Doing Business Under the Name of J. S. GUERIN & CO., and GOLDEN GATE ATLAS MATERIALS CO., a Corporation,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

For Alleged Bankrupt and Appellant:
TORREGANO & STARK, Esqs., Mills Bldg., San Francisco, Calif.

For Petitioning Creditors and Appellees:
BYRON COLEMAN, Esq., and MILTON NEWMARK, Esq., Crocker Bldg., San Francisco, Calif.

District Court of the United States, Northern District of California, Southern Division.

CLERK'S OFFICE.—No. 18022–S.

In the Matter of E. MASSAGLI, Doing Business as SAN FRANCISCO CONCRETE CO. and also as SAN FRANCISCO CONCRETE & MOSAIC WORKS,

Alleged Bankrupt.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of Said Court:

Sir: Please issue certified typewritten copies of the following papers to be used by the alleged bankrupt above named in the prosecution of an appeal to the United States Circuit Court of Appeals:

1. Creditors' petition.
2. Notice of motion to dismiss.

3. Minute order denying motion to dismiss and noting alleged bankrupt's exception.
4. Order of adjudication.

TORREGANO & STARK.
By ERNEST J. TORREGANO,
Attorneys for Alleged Bankrupt

[Endorsed]: Receipt of a copy of the within praecipe is hereby admitted this 17th day of May, 1929.

MILTON NEWMARK.

Filed at 3 o'clock and 15 Min. P. M., May 17, 1929. [1*]

[Title of Court and Cause.]

CREDITORS' PETITION.

To the Honorable Judges of the United States District Court for the Northern District of California:

Come now T. I. Butler Co., a corporation, organized under the laws of the State of California; J. S. Guerin and Stephen I. Guerin, copartners, doing business under the name of J. S. Guerin & Co.; and Golden Gate Atlas Materials Co., a corporation, organized under the laws of the State of California, and respectfully show:

That E. Massagli is, and during all of the times herein mentioned was, doing business under the name of San Francisco Concrete Co. and San Fran-

*Page-number appearing at the foot of page of original certified Transcript of Record.

cisco Concrete & Mosaic Works, of which said businesses said E. Massagli is and was the sole owner.

That said E. Massagli is neither a wage-earner, nor a person engaged chiefly in farming or the tillage of the soil, but is principally engaged in the business of concrete contracting, and has had his principal place of business for the greater portion of six months preceding the date of the filing of this petition in the city and county of San Francisco, State and Northern District of California, and owes debts to an amount in excess of One Thousand (1,000) Dollars, and is insolvent;

That your petitioners are creditors of said E. Massagli, having provable claims amounting in the aggregate in [2] excess of securities held by them, to the sum of Five Hundred (500) Dollars and over. The claims of your petitioners herein referred to are unsecured, and none of your petitioners is entitled to any priority under the provisions of the Acts of Congress relating to bankruptcy, nor has any of your petitioners received any preference as provided in said Acts of Congress relating to bankruptcy.

The nature and amount of your petitioners' claims are as follows:

Goods, wares, and merchandise sold and delivered by said T. I. Butler Co. to E. Massagli, within two years last past, in the sum of One Thousand Two Hundred Twenty-one and 93/100 (1,221.93) Dollars, no part of which has been paid.

Goods, wares, and merchandise sold and delivered by said J. S. Guerin & Co., a copartnership, to said

E. Massagli, within two years last past, in the sum of Seven Hundred Seven and 40/100 (707.40) Dollars, no part of which has been paid .

Goods, wares, and merchandise sold and delivered by said Golden Gate Atlas Materials Co. to said E. Massagli, within two years last past, in the sum of Forty-six (46) Dollars, no part of which has been paid.

Your petitioners further represent that said E. Massagli is insolvent, and that within four months next preceding the date of this petition, and while insolvent, said E. Massagli committed an act of bankruptcy, in that he did transfer, while insolvent, a portion of his property to one of his creditors, with intent to prefer such creditor over his other creditors, in this: Your petitioners are informed and believe, and on such information and belief allege, that on or about the 2d day of January, 1929, at the city and county of San Francisco, State of California, said E. Massagli did pay over unto Anthony Devoto the sum of One Thousand (1,000) Dollars. Your petitioners [3] allege, on information and belief, that said Anthony Devoto was, then and there, an unsecured creditor of said E. Massagli, and that said moneys so transferred were, then and there, the property of said E. Massagli, and part of his estate, subject to the satisfaction of the claims of his general unsecured creditors, including your petitioners herein. At the time of said transfer said Massagli was indebted to a large number of unsecured creditors, including your petitioner herein, and said transfer was made with in-

tent to prefer said Anthony Devoto over the other unsecured creditors, including your petitioners, and the effect of such transfer is to give to said Anthony Devoto a greater percentage of his indebtedness than the said petitioning creditors.

WHEREFORE, your petitioners pray that service of this petition, together with a subpoena, be made upon E. Massagli, as provided in the Acts of Congress relating to bankruptcy, and that he may be adjudged by the Court to be a bankrupt within the purview of said Acts; and for such other order as is proper in the premises.

T. I. BUTLER CO.
By T. I. BUTLER,
President.
J. S. GUERIN & CO.
By STEPHEN I. GUERIN,
Member of Said Copartnership.
GOLDEN GATE ATLAS MATERIALS CO.
By CARROLL STEPHENS,
Assistant Secretary.

BYRON COLEMAN,
MILTON NEWMARK,
Attorneys for Petitioner. [4]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

T. Butler, being first duly sworn, deposes and says: That he is an officer, to wit, the president of T. I. Butler Co., a corporation, one of the petitioners mentioned in the foregoing petition, and

that he has read said petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

T. I. BUTLER.

Subscribed and sworn to before me this 28th day of March, 1929.

[Seal] THOMAS A. DOUGHERTY,
Notary Public in and for the City and County of San Francisco, State of California.

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

Stephen I. Guerin, being first duly sworn, deposes and says: That he is a member of the copartnership of J. S. Guerin & Co., one of the petitioners mentioned in the foregoing petition; that he has read said petition, and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

STEPHEN I. GUERIN.

Subscribed and sworn to before me this 28th day of March, 1929.

[Seal] THOMAS A. DOUGHERTY,
Notary Public in and for the City and County of San Francisco, State of California. [5]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

Carroll Stephens, being first duly sworn, deposes and says: That he is an officer, to wit, the assistant secretary of Golden Gate Atlas Materials Co., a corporation, one of the petitioners mentioned in the foregoing petition; that he has read said petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

CARROLL STEPHENS.

Subscribed and sworn to before me this 28th day of March, 1929.

[Seal] THOMAS A. DOUGHERTY,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Mar. 30, 1929, at 10 o'clock and 40 min. A. M. [6]

[Title of Court and Cause.]

NOTICE OF MOTION TO DISMISS.

To T. I. Butler Co., a Corporation, J. S. Guerin and Stephen I. Guerin, Copartners, Doing Business Under the Name of J. S. Guerin & Co. and Golden Gate Atlas Materials Co., a Corporation, and to Messrs. Byron Coleman and Milton Newmark, Their Attorneys:

You and each of you will please take notice, and you are hereby notified:

That on Monday, the 15th day of April, 1929, at the hour of 10 o'clock A. M., or as soon thereafter as counsel can be heard, before Hon. A. F. St. Sure, Judge of the above-entitled court, E. Massagli, respondent herein, will move the above-entitled court for an order dismissing the above-entitled proceedings upon the following grounds:

1. That it appears on the face of said petition that the Court is without jurisdiction to grant the relief prayed for in said petition.

2. That said petition does not state facts sufficient to warrant the Court to make or enter an order of adjudication herein or to grant the relief prayed for in said petition.

3. That said petition is not verified in accordance with the general orders and the form prescribed and promulgated by [7] the United States Supreme Court, pursuant to the provisions of the Bankruptcy Act.

4. That it cannot be ascertained from said petition, nor does it appear therein, what act of bankruptcy it is alleged that said respondent has committed.

5. That is cannot be ascertained from said petition, nor does it appear therein, if the said Anthony Devoto, the person to whom it is alleged the respondent transferred certain sums of money, was a general unsecured creditor holding an antecedent claim, or whether said transfer was made for a present consideration.

WHEREFORE, said respondent E. Massagli prays that the above-entitled court make and enter its order herein dismissing said petition of said petitioning creditors, and for such further and other order as may be just and proper in the premises.

Dated this 11th day of April, 1929.

TORREGANO & STARK.
By ERNEST J. TORREGANO,
Attorneys for Respondent. [8]

[Title of Court and Cause.]

ORDER SHORTENING TIME FOR SERVICE OF NOTICE OF MOTION TO DISMISS.

GOOD CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED that the time within which to serve the foregoing notice of motion be, and the same is, hereby shortened so that the same may be served upon the attorneys for said petitioning creditors on or before the 12th day of April, 1929.

Dated this 11th day of April, 1929.

A. F. ST. SURE,
District Judge.

[Endorsed]: Receipt of a copy of the within notice of motion, order shortening time, and copy of order extending time is hereby admitted this 11 day of April, 1929.

MILTON NEWMARK,
Attorney for Petn. Creditors.

Filed Apr. 11, 1929, at 3 o'clock and 40 min. P. M. [9]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the city and county of San Francisco, on Monday, the 15th day of April, in the year of our Lord one thousand nine hundred and twenty-nine. Present: The Honorable A. F. ST. SURE, District Judge.

[Title of Cause.]

MINUTES OF COURT—APRIL 15, 1929—ORDER DENYING MOTION TO DISMISS PETITION.

This matter came on this day for hearing on motion to dismiss petition, and after argument, the Court ORDERED that said motion be and the same is hereby denied, and an exception allowed to the ruling of the Court. [10]

[Title of Court and Cause.]

ORDER OF ADJUDICATION.

At San Francisco, in said District, on the 22d day of April, 1929, before the said Court in Bankruptcy, the petition of T. I. Butler Co., a corporation; J. S. Guerin & Co.; and Golden Gate Atlas

Materials Co., a corporation, that E. Massagli, doing business as San Francisco Concrete Co., and also as San Francisco Concrete & Mosaic Works, be adjudged bankrupt, within the true intent and meaning of the Acts of Congress relating to Bankruptcy, having been heard and duly considered, and it appearing to the Court that service of said petition with a writ of subpoena has been duly served on the alleged bankrupt and that the last day upon which pleadings may be filed has expired and no such pleadings have been filed by any parties hereto, it is hereby ordered that said E. Massagli, doing business as San Francisco Concrete Co., and also as San Francisco Concrete & Mosaic Works be and is hereby declared and adjudged bankrupt accordingly.

It is thereupon ORDERED that said matter be referred to Thos. J. Sheridan one of the referees in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said E. Massagli shall attend before said referee on the 3d day of May, 1929, at his office in San Francisco, California, at 10 o'clock forenoon and [11] thenceforth shall submit to such orders as may be made by said referee or by this Court relating to said matter in bankruptcy.

It is further ORDERED that all notices required to be published in the above-entitled matter, and all orders which the Court may direct to be published be inserted in "The Recorder" a newspaper published in the county of San Francisco, State of

California, within the territorial district of this Court, and in the county within which said bankrupt resides.

Dated, April 22, 1929.

A. F. ST. SURE,
District Judge.

[Endorsed]: Filed at 11 o'clock and — min. A. M. Apr. 22, 1929. [12]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable A. F. ST. SURE, District Judge:

The above-named respondent, feeling aggrieved by the order of adjudication in the above-entitled case made and entered on the 22d day of April, 1929, does hereby appeal from said decree and order to the Circuit Court of Appeals, for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith, and he prays that his appeal be allowed, and that a citation be issued as provided by law, and that a transcript of the records, proceedings, and documents upon which said order was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit under the rules of such Court in such cases made and provided;

AND YOUR PETITIONER FURTHER PRAYS that the proper order relating to the required security to be required of him be made.

TORREGANO & STARK.
By ERNEST J. TORREGANO,
Attorneys for Alleged Bankrupt.

Appeal allowed upon giving bond, as required by law, for the sum of two hundred and fifty dollars.

Dated this 10th day of May, 1929.

A. F. ST. SURE,
District Judge. [13]

[Endorsed]: Filed May 10, 1929, at 11 o'clock and 50 min. A. M. [14]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes the alleged bankrupt above named and files the following assignment of errors upon which he will rely during prosecution of appeal in the above-entitled cause from the order of adjudication made and entered by this Honorable Court on the 22d day of April, 1929, and says that the Court erred in making and entering the order of adjudication:

1. Because the alleged bankrupt above named filed timely objection to the creditors' petition, filed his motion to dismiss same, and asserted that it appeared on the face of said petition that the Court was without jurisdiction to grant the relief prayed

for in said petition, which motion was denied and exception noted.

2. Because the alleged bankrupt above named filed timely objection to the creditors' petition, filed his motion to dismiss same, and asserted that it appeared that the Court was without jurisdiction to grant the relief prayed for in said petition, the allegations of the act of bankruptcy being on information and belief, and no reason being stated in said petition as to why they could not be made on positive knowledge, which motion was denied and exception noted. [15]

3. Because the alleged bankrupt above named filed timely objection to the creditors' petition, filed his motion to dismiss same, and asserted that said petition did not state facts sufficient to warrant the Court to make or enter an order of adjudication herein or to grant the relief prayed for in said petition, which motion was denied and exception noted.

4. Because the alleged bankrupt above named filed timely objection to the creditors' petition, filed his motion to dismiss same, and asserted that said petition was not verified in accordance with the general orders and the form prescribed and promulgated by the United States Supreme Court, pursuant to the provisions of the Bankruptcy Act, which motion was denied and exception noted.

5. Because the alleged bankrupt above named filed timely objection to the creditors' petition, filed his motion to dismiss same, and asserted that it could not be ascertained from said petition, nor did

it appear therein, what act of bankruptcy said respondent had committed, which motion was denied and exception noted.

6. Because the alleged bankrupt above named filed timely objection to the creditors' petition, filed his motion to dismiss same, and asserted that it could not be ascertained from said petition, nor did it appear therein, whether the said Anthony Devoto, the person to whom it was alleged the respondent transferred certain sums of money, was a general unsecured creditor holding an antecedent claim, or whether said transfer was made for a present consideration, which motion was denied and exception noted.

7. Because the alleged bankrupt above named filed timely objection to the creditors' petition, filed his motion to dismiss same, which motion was denied and exception noted, and [16] notwithstanding said objection the above-entitled court made and entered its order of adjudication as aforesaid, although no amended petition was filed, properly verified, in accordance with the general orders and the form prescribed and promulgated by the United States Supreme Court, nor setting forth the allegation of the commission of the act of bankruptcy on the petitioner's positive knowledge.

WHEREFORE, the bankrupt above named prays that said order of adjudication heretofore made and entered by this Honorable Court be reversed, and that the said District Court be directed to enter an order dismissing the petition of T. I. Butler Co., a corporation, Golden Gate Atlas Mate-

rials Co., a corporation, and J. S. Guerin and Shephen I. Guerin, copartners, doing business under the name of J. S. Guerin & Co.

TORREGANO & STARK.
By ERNEST J. TORREGANO,
Attorneys for Petitioner.

[Endorsed]: Filed May 10, 1929, at 11 o'clock and 55 min. A. M. [17]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON APPEAL,

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 17 pages, numbered from 1 to 17, inclusive, contain a full, true and correct transcript of the records and proceedings in the matter of E. Massagli, etc., in Bankruptcy, No. 18,022–S, as the same now remains on file and of record in this office.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of six dollars and twenty cents ($6.20) and that the same has been paid to me by the attorney for the appellant herein.

Annexed hereto is the original citation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 22d day of May, A. D. 1929.

[Seal] WALTER B. MALING,
Clerk,
By C. M. Taylor,
Deputy Clerk. [18]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States, to T. I. Butler Co., a Corporation, J. S. Guerin and Stephen I. Guerin, Copartners, Doing Business Under the Name of J. S. Guerin & Co., and Golden Gate Atlas Materials Co., a Corporation, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, wherein E. Massagli, doing business as San Francisco Concrete Co., and also as San Francisco Concrete & Mosaic Works, alleged bankrupt, is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in

the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable A. F. ST. SURE, United States District Judge for the Northern District of California, this 10th day of May, A. D. 1929.

A. F. ST. SURE,
United States District Judge.

Receipt of a copy of the within citation on appeal and a copy of assignments of error, now on file, is hereby admitted this 17th day of May, 1929.

MILTON NEWMARK,
Attorney for T. I. Butler Co., J. S. Guerin and Stephen I. Guerin, and Golden Gate Atlas Materials Co.

[Endorsed]: Citation on Appeal. Filed at 3 o'clock and 15 min. P. M., May 17, 1929. [19]

[Endorsed]: No. 5828. United States Circuit Court of Appeals for the Ninth Circuit. E. Massagli, Doing Business as San Francisco Concrete Co., and also as San Francisco Concrete & Mosaic Works, Alleged Bankrupt, Appellant, vs. T. I. Butler Co., a Corporation, J. S. Guerin and Stephen I. Guerin, Copartners, Doing Business Under the Name of J. S. Guerin & Co., and Golden Gate Atlas Materials Co., a Corporation, Appel-

lees. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed May 23, 1929.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5828

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

E. MASSAGLI, doing business as San Francisco Concrete Co., and also as San Francisco Concrete & Mosaic Works, alleged bankrupt,

Appellant,

vs.

T. I. BUTLER CO. (a corporation), J. S. GUERIN and STEPHEN I. GUERIN, copartners, doing business under the name of J. S. Guerin & Co., and GOLDEN GATE ATLAS MATERIALS CO. (a corporation),

Appellees.

BRIEF FOR APPELLANT.

ERNEST J. TORREGANO,
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Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 5828

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

E. MASSAGLI, doing business as San Francisco Concrete Co., and also as San Francisco Concrete & Mosaic Works, alleged bankrupt,

Appellant,

vs.

T. I. BUTLER CO. (a corporation), J. S. GUERIN and STEPHEN I. GUERIN, copartners, doing business under the name of J. S. Guerin & Co., and GOLDEN GATE ATLAS MATERIALS CO. (a corporation),

Appellees.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

On March 30, 1929, the appellees filed an involuntary petition in bankruptcy against the appellant. The Act of Bankruptcy alleged therein was a transfer by appellant while insolvent and within four months next preceding the date of the petition of a portion of his property to one of his creditors with intent to prefer such creditor over his other creditors. The particulars of this transfer were alleged on information and belief and the fact that the money trans-

ferred was the property of the appellant is also alleged on information and belief as was the allegation that the transferee was an unsecured creditor of the appellant.

The verification of each of the three petitioning creditors was substantially in the following form:

> "United States of America,)
> State and Northern District of California,) *ss.*
> City and County of San Francisco.)
>
> T. Butler, being first duly sworn, deposes and says:
>
> That he is an officer, to wit, the President of T. I. Butler Co., a corporation, one of the petitioners mentioned in the foregoing petition, and that he has read said petition and knows the contents thereof; that the same is true of his own knowledge, *except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.*" (Italics ours.)

The appellant duly filed a notice of motion to dismiss the petition because of these defects, and thereafter the learned District Judge ordered that the said motion be denied and that an exception be allowed to the ruling of the Court.

Thereafter an order of adjudication was signed by the said District Judge and entered in the records of the District Court, from which order the appellant has prosecuted this appeal.

SPECIFICATIONS OF ERRORS RELIED UPON.

The first error relied upon was the order of the District Court adjudicating the appellant a bankrupt in spite of the fact that the appellant had timely

raised the objection that the allegations of the Act of Bankruptcy were based on information and belief, and that no reason was alleged in the petition as to why they could not have been made on positive knowledge.

The second error relied upon was the order of the District Court adjudicating the appellant a bankrupt in spite of the fact that he had timely raised the objection that the petition was not verified in accordance with the general orders and the form prescribed and promulgated by the United States Supreme Court pursuant to the provisions of the Bankruptcy Act.

ARGUMENT.

Official Form No. 3 prescribed by the Supreme Court of the United States requires a verification to a creditor's petition to be in the following form:

> "....., being three of the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition subscribed by them *are true.*" (Italics ours.)

This Honorable Court has previously held in the case of *In re Gerber,* 186 Fed. 693, 26 Am. B. R. 608, that the orders and official forms in bankruptcy promulgated by the Supreme Court of the United States have the force and the effect of law.

This Honorable Court has likewise passed upon this exact question in the case of *Sabin v. Blake, McFall Co.,* 35 Am. B. R. 79, 223 Fed. 501. In that case the late Judge Morrow, after citing *In re Gerber, supra,*

pointed out that Form No. 3, as quoted above, differs from the verification prescribed in Form No. 1 for a voluntary petition, in that the latter form provides that the verification shall be made according to the best of the affiant's knowledge, information and belief. Judge Morrow then laid down the rule that a verification to a creditors' petition must be made on the actual knowledge of the affiant and not according to the best of his knowledge, information and belief. Great emphasis was placed on the fact that while in a voluntary petition the debtor admits his insolvency and consents to surrender his property for the benefit of his creditors, the situation is entirely different with respect to a creditors' petition, in that the hailing of a debtor into the Bankruptcy Court may be a very serious matter and bring about a bankruptcy that might have been avoided. To quote from his opinion:

> "Bankruptcy proceedings ought not to be subject to the alarm of creditors acting upon *information and belief*, based possibly upon mere gossip and rumor. They ought to know positively the truthfulness of the few facts they are required to present to the Court to secure an adjudication of bankruptcy. In the petition now before the Court, the creditors stated all the facts required and in the verification each stated 'the facts contained in the foregoing petition are true,' but added this qualification, 'as I verily believe.' Such qualification is no part of the form prescribed and there is nothing in the petition showing or tending to show that the qualification was necessary to suit the circumstances of the particular case as provided in Order No. XXXVIII. It may be that the added qualification was inserted by mistake following some erroneous form,

but in any view it rendered the verification defective." (Italics ours.)

It will be noted that the verification used by the appellees herein was slightly different from that discussed in *Sabin v. Blake McFall Co., supra.* In this case the verification was to the effect "that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true." Perhaps, if the petition contained no allegations on information and belief, the verification in the instant case would be good, as the qualification thereto could be disregarded as surplusage, but probably the most important allegation, that of the commission of the act of bankruptcy is based on information and belief, and the verification clearly qualifies that allegation. The result is, therefore, exactly the same as if the appellees had stated that the facts contained in the petition are true, as they verily believed.

In view of the decision of this Honorable Court in *Sabin v. Blake McFall, supra,* we believe it unnecessary to cite cases from other jurisdictions. However, in passing, we may note that a similar result has been reached in the Second Circuit in *In re Bieler & Batzer,* 295 Fed. 78, 2 Am. B. R. (N. S.) 192.

The contention of the appellant herein is even stronger than that urged in *Sabin v. Blake McFall, supra,* in view of the rule that the allegation of jurisdictional facts in a petition should not be made on information and belief. This rule is laid down in *Collier* 1927 Ed. p. 422, and finds support in the following cases:

In re Seifred, 4 Fed. (2nd) 305, 6 A. B. R. (N. S.) 33;

In re Rodriguez Torres & Co. (D. C. Porto Rico), 2 Am. B. R. (N. S.) 842;

In re Blumberg, 143 Fed. 845, 13 Am. B. R. 343.

In *In re Rodriguez Torres & Co., supra,* the first headnote is as follows:

> "An allegation in an involuntary petition of an act of bankruptcy by fraudulent transfer is insufficient which alleges, *merely upon information and belief,* that within four months preceding the filing of the petition the alleged bankrupt committed an act of bankruptcy by the conveyance, transfer, concealment or removal of a part of its goods and personal property in favor of parties unknown, with intent to hinder, delay or defraud their creditors." (Italics ours.)

In *In re Blumberg, supra,* the Court stated:

> "The difficulty of obtaining accurate information concerning fraudulent transfers of property or preferential payments has been suggested as an excuse for the vagueness of such averments as are found in this petition, and I am not insensible that such difficulty may often exist. Due allowance should be made for it, but the petitioning creditors are nevertheless bound to as full a disclosure as their information may enable them to make *supplemented by an explanation of its lack of completeness,* so far as it may thus be lacking. Impossibilities are not expected of petitioning creditors, more than of other suitors; but they must found their case on something more than rumor, or vague hearsay, or mere suspicion. If they cannot aver the necessary facts on personal knowledge, or credible information, which is full enough to supply details that will justify the inference that is sought to be drawn, they

simply furnish one more example of an intending litigant who may believe that his opponent has done wrong, but is unable to prove it." (Italics ours.)

CONCLUSION.

In conclusion, it is respectfully submitted that upon the facts, authorities and arguments set forth and referred to in the preceding pages, the order of the United States District Court for the Northern District of California adjudging the appellant a bankrupt should be vacated, and that these proceedings should be remanded to the Court below, with instructions to the said Court to permit the petitioning creditors to amend their petition within ten days by alleging the acts of bankruptcy in positive terms and verifying the said petition on the positive knowledge of the petitioners, and that if said amendments are not made within ten days, said petition should stand dismissed, and that the appellant herein be awarded his costs of appeal.

Dated, San Francisco,
October 21, 1929.

ERNEST J. TORREGANO,
CHARLES M. STARK,
Attorneys for Appellant.

AUGUST B. ROTHSCHILD,
Of Counsel.

18

No. 5828

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

E. MASSAGLI, doing business as San Francisco Concrete Co., and also as San Francisco Concrete & Mosaic Works, alleged bankrupt,

Appellant,

vs.

T. I. BUTLER CO. (a corporation), J. S. GUERIN and STEPHEN I. GUERIN, copartners, doing business under the name of J. S. Guerin & Co., and GOLDEN GATE ATLAS MATERIALS CO. (a corporation),

Appellees.

BRIEF FOR APPELLEES.

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Attorneys for Appellees.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

No. 5828

IN THE

United States Circuit Court of Appeals

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E. MASSAGLI, doing business as San Francisco Concrete Co., and also as San Francisco Concrete & Mosaic Works, alleged bankrupt,

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Appellees.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

Appellees filed a petition in involuntary bankruptcy seeking to have appellant, Massagli, adjudged a bankrupt. The bankrupt moved to dismiss the petition upon the ground that it was improperly verified. The District Court denied his motion, and the bankrupt filing no answer, an order of adjudication was made. This appeal is taken from the order of adjudication, the bankrupt claiming that the denial of his motion to dismiss was error.

ARGUMENT.

We believe the petition is properly drawn and verified. It specifically and definitely apprises the alleged bankrupt of what he is called upon to meet. All things within the knowledge of the creditors are sworn to absolutely. Those details which necessarily lie within the knowledge of the debtor and not within the knowledge of the creditors, are alleged with particularity but upon information and belief. The petition is verified absolutely as to all matters alleged absolutely, and as to the matters therein stated on information and belief, the verifying affiants affirm that they believe it to be true. The pleading fully informs the bankrupt of the issues he is called upon to defend, and the verification goes as far as any conscientious and responsible litigant can properly go. Such objections to a pleading are captious.

There is no authority to support the claim of the appellant.

The bankrupt cites *Sabin v. Blake-McFall Co.*, 35 Am. B. R. 179. In that case the whole petition and all of its allegations were verified upon belief. The court says, page 184:

> "In this petition the statement must show the principal place of business of the debtor: that he owes debts to the amount of $1,000; that the petitioners are creditors having provable claims amounting in the aggregate, in excess of securities held by them, to the sum of $500; the nature and amount of the petitioners' claims; and that the debtor had committed an act of bankruptcy within four months. This statement can be and ought to be direct and positive."

In our petition, all of these statements referred to by the court, are direct and positive.

The bankrupt cites *Matter of Bieler and Batzer,* 2 Am. B. R. (N. S.) 192. In this case also it is the whole petition and all of its allegations that are verified on information and belief.

The bankrupt cites *Matter of Seifred,* 6 Am. B. R. (N. S.) 33. This case is in our favor. The petition states:

> "We understand, believe, and allege that there are less than twelve creditors."

The Circuit Court of Appeals, affirming the District Court, holds the petition sufficient. The court says, at pages 37, 38:

> "The allegation, of course, must have been made on some understanding and belief, and the words 'understand' and 'believe' may be treated as surplusage."

The District Court whose judgment is thus affirmed (2 Am. B. R. (N. S.) 91), 293 Fed. 936, speaking through Lowell, District Judge, says, at page 92:

> "Statement of facts in an involuntary petition must usually be as of the knowledge of the petitioner. * * * This was the case in the petition under consideration, except as to the allegation of the number of creditors. There seems to be no reason why this allegation should not be made on information and belief, as it is of a fact which may not be easily susceptible of definite knowledge. A learned text writer states this to be the law (1 Black, Bankruptcy, 3d Ed., sec. 160)."

Appellant cites *In the Matter of Rodriguez Torres & Co.,* 2 Am. B. R. (N. S.) 842. This case is not in point. It does not turn upon any question of verifica-

tion, nor upon any question of pleading on information and belief. The case concerns itself entirely with the sufficiency of the allegations, whether sufficiently specific and definite or too vague and general.

In the case of *Re Blumberg,* 13 Am. B. R. 343, there is also no question of verification, nor any question of pleading upon information and belief. The question considered here also was whether the allegations were sufficiently specific. The language of the court, moreover, clearly implies that the specifications of detail of the preference charged may be made upon information and belief.

The case of *In re Gerber,* 26 Am. B. R. 608, cited by the bankrupt, holds that where a bankrupt failed to claim his statutory exemptions in the manner and within the time prescribed by the general orders and forms, he thereby waived his rights. The case has nothing to do with any question of the form or verification of the petition.

These are the cases cited by appellant. On page five of his brief, appellant states that in view of the decision of this court in the *Sabin* case, he believes it unnecessary to cite cases from other jurisdictions, thereby raising an implication that such cases can be found. We have searched the books, and fail to find in this or any other jurisdiction any case to support the contention of appellant.

In the case of *In re Vastbinder,* 11 Am. B. R. 118 (D. C., Pa., 1903), 126 Fed. 417, the petition was verified in toto by affidavit that the statements therein are true to the best of the knowledge, information, and

belief of affiants, and the court sustained a demurrer upon this ground with leave to amend the defect. The court says, at page 119:

> "The difficulty is, that the facts which are affirmed of knowledge are not distinguished from those which are based on information, thus in effect dissipating the force of the affidavit."

The petition in the case of *In re Farthing,* 29 Am. B. R. 732 (D. C., North Car., 1913), 202 Fed. 557, was verified in toto, as to all the statements of fact therein contained, upon information and belief. The petition was demurred to upon this ground and also upon the ground that certain allegations were too general and not set out with sufficient definiteness and particularity. The court says, page 738:

> "It would seem reasonable and just to apply to the petition in this respect the test by which the sufficiency of a declaration or complaint is measured in an action upon a negotiable instrument. The rule uniformly applied is that material facts should be distinctly, and not inferentially alleged. The court will not supply, by intendment, an averment which the pleader has failed to make. The facts constituting the cause of action should be set forth in the complaint with definiteness and certainty. The plaintiff, in his complaint, should apprise the defendant of the precise grounds upon which he relies. The facts may be alleged either upon plaintiff's own knowledge, or upon information and belief."

In the case of *Matter of Ball,* 19 Am. B. R. 609 (D. C., N. Y., 1907), 156 Fed. 682, the commission of the acts of bankruptcy was alleged upon information and belief, and the verification states that the facts contained in the petition are true except as to the matters stated to be alleged on information and belief,

and as to those matters, affiant believed them to be true. Both as to manner of the allegations and the form of the verification, the petition in the *Ball* case is identical with the petition under consideration. The bankrupt's demurrer was overruled. The court says, at page 611:

> "It would seem from the language of the prescribed form that a petition in involuntary bankruptcy is looked upon in the same light as a complaining affidavit in the matter of a criminal charge. The language 'your petitioners further represent that' is the statement of a conclusion and of an allegation which it is apparent must in all cases be made upon hearsay, information and knowledge derived from sources other than the actual personal knowledge of the party making the petition. The language of the verification is to the effect that the petitioners swear that the statement made by them is true. This statement is that they 'represent' or allege to the court the doing of certain things by the alleged bankrupt. The affiant swears that he charges certain acts against the bankrupt, and he implies that he has verified them so as to be willing to stand by the consequences of his charge. He is not testifying as to what he has seen or done. The verification is not equivalent to an oath that the person making the verification has actual knowledge that certain acts were done, because they occurred in the presence of the petitioner. The oath is not subject to the rules of competency with respect to hearsay testimony. On this account the insertion of the words in a petition, that it is made upon information and belief, neither add to nor detract from the strength of the allegation, and likewise in the verification the additional statement that the petitioners believe the matters which are stated to be alleged upon information

> and belief to be true, is mere surplusage, and while the language should not be used, it is no ground for dismissing the petition. The cases cited are not, in the opinion of the court, in contradiction of this view."

The court, *In re Bellah,* 8 Am. B. R. 310 (D. C., Del., 1902), 116 Fed. 69, compares bankruptcy pleading with pleadings in criminal cases, and states, at page 314:

> "It is a general rule, subject to qualification in some instances, that an indictment for a statutory offense is sufficient if it charges the defendant with the commission of acts within the statutory description, 'in the substantial words of the statute without any further expansion of the matter.'" (Citing cases.) "But 'it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.'"

And the court quotes from *U. S. v. Simmons,* 96 U. S. 360, where the court, through Mr. Justice Harlan, referring to the general rule, said:

> "'But to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense, and plead the judgment as a bar to any subsequent prosecution for the same offense. An indictment not so framed is defective, although it may follow the language of the statute.'"

At page 315 the court says:

"But the qualification of the general rule, while requiring that the defendant shall be apprised with reasonable certainty of the offense charged against him, does not contemplate that mere matter of evidence not necessary for that purpose shall be spread upon the face of the indictment. * * *

"Here an act of bankruptcy is charged in the language of the statute. The petition alleges that the defendant at and since a specified time 'concealed and secreted' a specified fund 'with intent to hinder, delay or defraud his creditors.' The charge is clear and specific. No room is left for doubt on the part of the defendant as to the nature and extent of the accusation."

At page 316 the court says:

"If the defendant concealed the specified fund as alleged, it must be assumed that the details and circumstances of the concealment were within his knowledge, and no hardship can be involved in requiring him to answer and meet the charge of concealment, as made, without 'further expansion of the matter.' On the other hand, to require the petitioning creditors in such a case to set forth the details of the concealment or secretion not only would be unnecessary to the due protection of the defendant, but might, and probably would, require the performance of an impossibility. The application of such an impracticable standard of particularity would necessarily defeat all petitions in involuntary bankruptcy based on fraudulent concealment by the defendant of his property, where the evidence of such concealment is circumstantial and not direct and positive."

In the petition here under consideration, we allege the commission of the act of bankruptcy in the terms of the statute absolutely, and supply the details thereof upon information and belief.

A motion to dismiss a petition in bankruptcy was denied in *Matter of Parker*, 48 Am. B. R. 697 (D. C., Ill., 1921), 275 Fed. 868. The court says, at page 700:

> "The allegation setting forth the alleged act of bankruptcy might well be more particular and specific than the allegations of indebtedness and insolvency; but here, too, the facts are in the possession of the debtor, and reference to the transaction constituting the alleged act of bankruptcy necessarily apprises the debtor of the transaction complained of, the details of which need not be charged with greater particularity because they are known better to the debtor than to the petitioning creditors."

While it is true that the rules and forms prescribed by the Supreme Court have the force and effect of law, it is equally true that bankruptcy practice should be reasonably adapted to the accomplishment of the purposes of the Act, and the promotion of justice. The forms are directory, and they are intended to secure uniformity and simplicity of practice. They were not designed as pitfalls for the unwary, nor to create arbitrary and purposeless technicalities. General Order XXXVIII provides that the forms should be observed and used "with such alterations as may be necessary to suit the circumstances of any particular case."

In *West Co. v. Lea Brothers & Co.,* 2 Am. B. R. 463, 174 U. S. 590, the Supreme Court holds that a petition based upon an assignment for the benefit of creditors need not allege insolvency, the official form to the contrary notwithstanding. The court, speaking through Mr. Justice White, says (page 470):

> "These rules were but intended to execute the act, and not to add to its provisions by making that which the statute treats in some cases as immaterial a material fact in every case."

A motion to dismiss for want of proper verification was overruled *In re Simonson, Whiteson & Co.,* 1 Am. B. R. 197 (D. C., Ky., 1899), 92 Fed. 904, and the court refers to the rules and forms prescribed by the Supreme Court, at page 205, as follows:

> "Of course, the rules, in a general sense, are obligatory, but the practice in bankruptcy cases must be reasonably adapted to practical conditions, and the rules should be applied to promote the ends of justice, and not to the attainment merely of literal and technical exactness in formal matters."

Collier on Bankruptcy (13th Ed.), Vol. III, page 2060, sets out Official Form No. 3, Creditors' Petition. To this official form the learned authority appends the notation, "This form is demurrable."

The same author says (Vol. I, page 918):

> "The general orders are not to be taken as enlarging the statute, but must, if possible, be construed consistently with it. But the general orders are not always in tune with the law; and the forms show a want of harmony at times both with the law and the general orders."

We respectfully submit that the petition is fairly drawn and verified; that it places the bankrupt at no conceivable disadvantage; that the charges laid are authenticated as rigorously as should be required of the creditors; that the bankrupt's motion and appeal are not designed to protect any of his rights, and are without substantial merit.

Dated, San Francisco,
November 20, 1929.

Respectfully submitted,

MILTON NEWMARK,
BYRON COLEMAN,
Attorneys for Appellees.